LIBRARY
SUPREME COURT, U. S.

No. 609

Office-Supreme Court, U.S.
FILED
SEP 13 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

EMMA R. MOIST, etc., et al.,
Petitioners,

v.

BERNARD BELK, etc., et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

AUGUST F. BRANDT,
Attorney for Petitioners,
363 St. Clair Avenue,
Grosse Pointe, Michigan 48230.

Interstate Brief & Record Co., 356 E. Congress St., Detroit, Michigan 48226
WO. 2-8745—WO. 2-8732

INDEX

	Page
Opinion below	2
Jurisdiction	3
Question presented	3
Constitutional Amendment and Statutes Involved	3, 4, 5
Statement	5, 13
Reasons for granting writ	13-26
Conclusion	27
Appendix A (Opinion of the Court of Appeals)	29-41

CITATIONS

Cases:

Batista v. Weir, 340 F.2d 74	19
Brouwer v. Kent County Clerk, 377 Mich. 616	14-15
Chatham Shipping Co. v. Fertix Steamship Corp., 352 F.2d 291	33
Cohen v. Curtis Publishing Co., 333 F.2d 974	21
Cohen v. Norris, 300 F.2d 24	19
Crites, Inc. v. Prudential Co., 322 U.S. 408	26
Davis v. F. W. Woolworth Co., 54 F.2d 366	21
Davis v. Johnson, 138 F. Supp. 572	14
Duzynski v. Nosal, 324 F.2d 924	19
Harvey v. Lewis, 357 Mich. 305	8, 16, 17, 22, 23, 30, 32-33

	Page
Hartford Accident & Indemnity Co. v. Jasper, 144 F.2d 266	18
Hellenic Lines, Limited v. The Exmouth, 253 F. 2d 473	18
Hurd v. Meyer, 259 Mich. 190	23
Jimenez v. Barber, 252 F.2d 550	33
John v. Gibson, 270 F.2d 36	33
Jordan v. Kelley, 223 F. Supp. 731	19
Lee v. Hodges, 321 F.2d 480	19, 20
Marshall v. Sawyer, 301 F.2d 639	21
Monroe v. Pape, 365 U.S. 167	14
Morrison v. Texas Company, 289 F.2d 382	21
Phelan v. Middle States Oil Corp., 154 F.2d 978	25
Powell v. Maryland Trust Co., 125 F.2d 260	23, 24
Powell v. Workmen's Comp. Bd. of State of N.Y., 327 F.2d 131	19
Roberts v. Trapnell, 213 F. Supp. 49	20
United States Fidelity & Guaranty Co. v. McCarthy, 33 F.2d 7	17-18
United States v. Madden, 352 F.2d 792	33
Waddell v. Chicago Land Clearance Comm., 206 F.2d 748	33
York v. Story, 324 F.2d 450	18

Constitutional Amendments: Page

Sec. I, 14th Amendment 4

Statutes:

28 U.S.C.A.:

Sec. 1254 (1) 3

Sec. 1291 3

Sec. 1331 (a) 4

42 U.S.C.A.:

Sec. 1983 ..... 4, 13, 14, 18, 19

Sec. 1985 (2) 5, 13, 14

Michigan Compiled Laws of 1948:

Sec. 450.75 ..... 9, 23

Sec. 456.107 ..... 10, 23

Sec. 456.107a 10, 23

Sec. 456.109 ..... 9, 12, 23, 26

Sec. 623.43 ..... 12, 26

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. .....

EMMA R. MOIST, individually and as assignee of Sidney M. Harvey and William T. McAlonan; LOUISE C. KUSHIGIAN, Administratrix of the Estate of Thermie K. Henkle, deceased; GEORGIANA S. WHITMAN, survivor of herself and Henry R. Whitman, deceased, and EVELYN M. SANDERS, Special Administratrix of the Estate of Muriel Miller, deceased,

Petitioners,

versus

BERNARD BELK, individually and as alleged "Receiver" of Brookdale Cemetery Association and Brookdale, Inc., alleged Michigan corporations, GEORGE LEWIS, individually and as survivor of himself and Daniel Lewis and Saul Lewis, both deceased, formerly co-partners doing business as Lewis Brothers and as Lewis Bros., Inc., Lewis Brothers Memorial Chapel, Daniel Lewis & Brothers, Lewis Bros. Funeral Directors, Inc., and Mt. Sinai Memorial Cemetery Association, CHARLOTTE L. KLINE, Administratrix of the Estate of Saul Lewis, deceased, NAOMI V. HILSEN and RICHARD E. MANNING, successor administrators, duly appointed of the Estate of Daniel Lewis, deceased, BROOKDALE CEMETERY ASSOCIATION, an alleged Michigan Rural Cemetery Association, BROOKDALE, INCORPORATED, an alleged Michigan Profit corporation, CONSTANTINE A. TSANGADAS, JOHN R. STARRS, STANLEY E. BEATTIE, RALPH W. McKENNEY, SYDNEY LIST, DAPHNE LIST, JAMES M. WIENNER, Administrator of the Estate of Harris W. Wiennér, deceased, and DEPARTMENT OF COMMERCE, formerly Corporation and Securities Commission, of the State of Michigan,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Earl Warren, Chief Justice of the Supreme Court of the United States, and *the Associate Justices of the Supreme Court of the United States:*

The Petitioners, Emma R. Moist, individually and as assignee of Sidney M. Harvey and William T. McAlonan, et al., by their attorney, August F. Brandt, respectfully petition this Honorable Court for a writ of certiorari to review a judgment and opinion of the Court of Appeals for the Sixth Circuit rendered in this cause on June 17, 1967.

Your Petitioners respectfully show:

I.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is appended to this Petition and by reference made a part hereof. The opinion in the United States District Court for the Eastern District of Michigan, Southern Division has not been printed in the official reporter, but is found at pages 242a-248a of the Certified printed Transcript of the Record.

II.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Sixth Circuit was rendered in this cause on June 17, 1967.

The statutory provision believed to confer jurisdiction on this Court to review the judgment of the Court of Appeals for the Sixth Circuit is Section 1254 of Title 28 of the United States Code Annotated.

III.

QUESTION PRESENTED FOR REVIEW

Does a federal court have jurisdiction of this suit as one arising under the Constitution and laws of the United States?

IV.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The constitutional provisions and statutes which this case involved are as follows:

A. The jurisdiction of this court is invoked under the provisions of Section 1254 (1), Title 28, United States Code Annotated: "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; • • • "

B. The right of the Court of Appeals to review the final decisions of the District Court dismissing petitioners' Complaint maintained under Section 1291, Title 28, United States Code Annotated: "The courts of appeals shall have

jurisdiction of appeals from all final decisions of the district courts of the United States, * * * except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, §48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, §12 (e), 72 Stat. 348.

C. The plaintiffs in the District Court maintained that that court had jurisdiction to determine the cause under the following constitutional and statutory provisions respectively:

Section 1 of the Fourteenth Amendment to the Constitution of the United States of America:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 1331 (a), Title 28, United States Code Annotated:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum of value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

Section 1983, Title 42, United States Code Annotated:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R. S. §1979."

Section 1985 (2), Title 42, United States Code Annotated:

> "* * * or if two or more persons conspire for the purpose of impeding, obstructing, or defeating in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;"

V.

STATEMENT

The following facts have not been denied:—During 1936 and 1937, plaintiffs and one Susan L. Pearlstein were induced to invest $8,500.00 in Brookdale Syndicate Number One, the only money so invested, to enable one A. L. Waters to make a timely $7,500.00 down payment on his Option to purchase 140 acres of dedicated cemetery land for $40,000.00 (R. 12a-14a; 16a-18a; Plt. Exh. 1, 96a-103a; Plt. Exh. 5, 108a-109a). This syndicate, subsequently composed solely of plaintiffs, was expressly formed to acquire said land and to form a certain company to be known as "Brookdale Cemetery Association" by members of the syndicate as incorporators (R. Plt. Exh. 5, 108a).

Pursuant to the express terms of the aforesaid syndicate agreement, the record title to said land, subject to a purchase money mortgage of $32,500.00 (R. Plt. Exh. 7, 110a-115a), was thereafter vested in Brookdale Cemetery Association, incorporated as a Michigan non-profit, rural cemetery corporation (R. Plt. Exh. 8, 9, 10, 116a-124a).

No stock of Brookdale Cemetery Association was ever issued to any person, firm or corporation (R. 22a). On

August 31, 1940, the corporate Charter of Brookdale Cemetery Association became void for failure to file any annual reports and pay any annual franchise fees pursuant to Michigan law, and its corporate powers were never thereafter lawfully revived (R. 22a). Only plaintiffs, by virtue of their aforesaid syndicate investment and membership have ever had any claim whatever to the equitable and beneficial ownership of the assets of said defunct corporation.

During the period provided by Michigan law to wind up the affairs of the aforesaid defunct corporation, and after said Waters dropped out and abandoned said enterprise (R. 31a), Defendants Lewis surreptitiously induced certain of his associates to execute, as alleged "President" and "Secretary" of Brookdale Cemetery Association, warwanty deeds whereby 64 acres of said 140 acres of land were conveyed to Congregation Beth El and Mt. Sinai Memorial Cemetery Association (now Congregation Adas Shalom) for $110,000.00, all of which money Defendants Lewis were subsequently adjudged to have fraudulently misappropriated (R. 31a-36a; Plt. Exh. 23, 25, 26, 33, 42; 135a-152a; 155a).

Approximately eight months after Brookdale Cemetery Association was incorporated as a Michigan non-profit, rural cemetery, certain associates of said Waters incorporated Brookdale, Inc., as a Michigan profit corporation, to effectuate certain secret agreements Waters had made with them (R. 10a-20a; 26a-28a). On August 31, 1940, no annual reports ever being filed and no annual franchise fees ever being paid by Brookdale, Inc. pursuant to Michigan law, the corporate Charter of this corporation, penniless and wholly without assets since incorporation, also became void, and was never thereafter lawfully revived (R. 27a-29a; 38a).

On November 22, 1952, plaintiffs filed a Complaint against Defendants Lewis in the Circuit Court In Chancery for Wayne County, Michigan, which fairly required a trial of the issue of title and ownership of the remaining 68 acres of said land and an accounting (R. 45a-46a).

On February 29, 1956, the aforesaid State court adjudged the title and ownership of said 68 acres of land to be in plaintiffs, not as individuals, but as a corporate entity, and ordered Defendants Lewis to account (R. Plt. Exh. 33, 42, 148a, 156a, 160a). Thereafter, for over two years, except for the reluctant responses of Defendants Lewis to demands for an accounting pursuant to the express order of the State court, the State litigation was at an end (R. 66a, Plt. Exh. 33, 148a).

On March 21, 1958, acting in concert, the defendants, especially Defendant Sydney List, held guilty of false swearing and embezzlement and adjudged guilty of contempt in the State proceedings (R. 54a, Plt. Exh. 44, 161a-162a), and Defendants Lewis, standing exposed to conviction for fraud (R. Plt. Exh. 33, 149a-150a), began to *purposedly* conspire to bring about the appointment of one of their number as receiver of the two aforesaid defunct corporations by deliberately filing fraudulent claims against Brookdale Cemetery Association (R. 65a-66a). This purposeful conspiracy was deliberately designed to enable said defendants to obstruct and interfere with the laws of Michigan, and under color of law and by virtue of the power possessed by said receiver as an officer of the State, to deprive plaintiffs of rights of equality, equal protection of the laws and equal privileges under the law guaranteed by the Constitution and laws of the United States (R. 5a-6a).

On June 27, 1958, continuing to act in concert as aforesaid, defendants obtained the appointment of Defendant John R. Starrs as receiver of Brookdale Cemetery Association and Brookdale, Inc. (R. 50a). There was then actually $57,000.00 in cash belonging to Brookdale Cemetery Association readily available, a fact well known to defendants prior to said appointment, but not disclosed to the successor State circuit judge (R. 56a). Other than the aforesaid purchase money mortgage of record (R. Plt. Exh. 7, 110a-115a), Brookdale Cemetery Association, defunct since August 31, 1940, and never lawfully revived (R. 22a), had no bona fide creditors, and no lawful cemetery business had been operated on said 68 acres of land by it at any time, or by any other corporation since 1932 (R. 51a). Legally free from taxation, adequately fenced, with no improvements requiring upkeep, said land was steadily and substantially increasing in value (R. 51a-52a). As aforesaid, Brookdale, Inc., also defunct since August 31, 1940, and never lawfully revived, had always been penniless and wholly without assets since incorporation (R. 27a-29a).

On October 16, 1958, a claim of appeal was filed from an order of the State Court to sell the assets of Brookdale Cemetery Association, including said 68 acres of land, on the petition of Defendant Starrs as its receiver (R. 60a). Thereafter, on October 12, 1959, the Supreme Court of Michigan, on "the case as presented to it on the action of the trial court in authorizing the sale of assets, and particularly said 68 acres of land, and also the issue raised under the pleadings filed in the trial court as to the legal title and ownership of said land embraced in the order of sale," specifically adjudged the legal title and ownership of said land to be in Brookdale Cemetery Association and subject to the jurisdiction of the court in the receivership proceeding. *Harvey v. Lewis*, 357 Mich. 305, at pp. 307 and 314.

During pendency of the aforesaid appeal, Defendant Starrs, as receiver of Brookdale Cemetery Association, continuing to act in concert with the other defendants, and wrongfully using the power possessed by him as a State officer, established an entirely new cemetery business for such defunct corporation upon said 68 acres of mortgaged land, contrary to Michigan law, which expressly forbids continuing the business for which a corporation was organized more than 3 years after its Charter shall have become void:

> CL 1948, Sec. 450.75 (Stat Ann Sec. 21.75) All corporations whose charters shall have expired by limitation or dissolution or shall be annulled by forfeiture or in any other way or manner have become void shall nevertheless continue to be bodies corporate for the further term of 3 years from such expiration, dissolution or forfeiture for the purpose of prosecuting and defending suit for or against them and of enabling them gradually to settle and close their affairs and to dispose of and convey their property and divide their assets; *but not for the purpose of continuing the business for which such corporations were organized;* * * * (Emphasis added.)

and thereafter, Defendant Starrs, as receiver, using the power possessed by him as a State officer, wrongfully burdened said 68 acres of land with upwards of 6,000 graves (R. 87a), contrary to Michigan law, which expressly forbids the sale of burial rights upon mortgaged land:

> CL 1948, Sec. 456.109 (Stat Ann Sec. 21.879) Sec. 9 No mortgage or other lien or incumbrance, shall be executed upon any lands of such corporation, actually used for burial purposes, *and no right of burial upon any mortgaged lands of such corporation,* lands which are delinquent for taxes or special assessments or lands to which such corporation does not have title in fee, *shall at any time be granted or sold by it.* (Emphasis added.)

Furthermore, Defendant Starrs, as receiver, thereafter totally dissipated upwards of $417,000.00 realized from said unlawful burials, substantially in fees, expenses and commissions paid himself, his counsel, and Defendant Sydney List, and in addition thereto incurred additional liabilities of $112,738.05 (R. 57a, 87a-88a), without making any provision whatever to establish a perpetual care fund for said graves, estimated to be $360,000.00, also expressly required by Michigan law:

> CL 1948, Sec. 456.107 (Stat Ann Sec. 21.897) Sec. 7. It shall be the duty of such board of directors to preserve good order in the grounds of such cemetery; * * * to establish an irrevocable endowment fund or funds to provide income for the purpose * * *, such fund to be governed by the terms of provisions of section 7a, hereof; * * *.
>
> CL 1948, Sec. 456.107a (Stat Ann Sec. 21.877(1) Sec. 7a(1) The fund required to be set aside under Section 7 for the purpose of keeping the grounds of such cemetery in good condition shall be a minimum of $5,000 for each acre of land owned by said cemetery and hereafter developed for cemetery purposes.

On March 23, 1960, Defendant Starrs, continuing to act in concert with the other defendants, purporting to act under the authority of the State, wrongfully using the power possessed by him as receiver to further said conspiracy, declared the sole and entire outstanding stock of Brookdale Cemetery Association to be 1,500 shares of capital stock, and that all and singular the ownership thereof was in himself as receiver of Brookdale, Inc., and no other person, firm or corporation whatsoever. He thereupon created a new stock register for said Brookdale Cemetery Association, and issued a single certificate for such 1,500 shares of capital stock to himself as receiver of Brookdale,

Inc. (R. Plt. Exh. 58, 188a-190a). Thus, *without any consideration whatever passing,* he arbitrarily transferred all of the assets of the one defunct, non-profit, rural cemetery corporation, *including its record title to said 68 acres of dedicated cemetery land,* to the other defunct, profit corporation, previously penniless and wholly without assets since incorporation (R. 27a-28a), while both were under his dominion as such a State officer.

On April 1, 1960, Defendant Starrs, continuing to act in concert with other defendants, and wrongfully using the power possessed by him as receiver for the express purpose of completing the principal object of said conspiracy, likewise created a new stock register for defunct Brookdale, Inc., and issued new certificates of its stock representing 91.7% of its ownership to Defendants Lewis and Tsangadas (R. Plt. Exh. 59, 191a-194a), arbitrarily destroying plaintiffs' previously adjudicated 100% ownership of said 68 acres of land as a corporate entity (R. Plt. Exh. 42, 156a, 160a).

On June 16, 1961, Defendant Starrs, continuing to wrongfully use the power possessed by him as receiver, arbitrarily compromised the fraudulent claim of his co-conspirator Harris W. Wienner, for alleged legal services rendered Brookdale Cemetery Association in 1937 (R. 19a), never proven, submitted for the first time to effect his appointment as receiver (R. Plt. Exh. 61, 195a-196a).

On October 12, 1965, Defendant Starrs, charged with conflict-of-interest resigned as receiver of Brookdale Cemetery Association when it was disclosed he had secretly joined Defendant Sydney List as a partner in the Eagle Stone and Monument Compay, which sold most Brookdale grave markers, and he had engaged in other community-shocking misconduct and indiscretions incompatible with

his position as an officer of the court (R. 87a-88a, Plt. Exh. 3, 104a). Defendant List was paid $85,000.00. Defendant Starrs, in addition to his Eagle Stone and Monument Company earnings and exorbitant receivership fees already paid him (R. 57a), now claims additional receivership fees of $60,000.00 for the period ending February 23, 1963 with interest at 6% until paid (R. 88a), plus fees up to October 12, 1965, the date he resigned, yet undetermined.

The receivership milked dry by Defendants Starrs, Beattie, List and McKenney (R. 57a, 59a, 87a-88a), after Defendant Starrs resigned, the said 68 acres of dedicated cemetery land was thereafter immediately pledged to secure a loan of $5,000.00 (R. 88a). Despite this fact, Defendant Bernard Belk, as successor receiver, has continued to sell burial rights and wrongfully burden said mortgaged land with additional graves (R. 90a), contrary to Michigan law (CL 1948, Sec. 456.109, supra), which expressly forbids the sale of burial rights upon mortgaged land.

On November 5, 1965, based solely on the petition of Defendant Harris W. Wienner for a Public Sale of Assets, the sale of said 68 acres of dedicated cemetery land was ordered to pay such judgment creditor (R. Plt. Exh. 62, 197a-198a), contrary to Michigan law:

> CL 1948, Sec. 623.43 (Stat Ann Sec. 27A 6023) The following property shall be exempt from levy and sale under any execution, or upon any other final process of a court: * * *
>
> 3. All cemeteries, tombs and rights of burial, while in use as repositories of the dead.

On December 22, 1966, the District Court granted the motion of defendants to dismiss the Complaint filed herein before answer and trial (R. 242a-253a), and plaintiffs subsequently perfected an appeal from such orders.

On June 17, 1967, the Court of Appeals sustained the motion of defendants to dismiss the aforesaid appeal on the erroneous assumption that all issues pleaded in the District Court have been, or could have been raised in the State courts (App. A-1, infra, pp. 29, 32, 33).

REASONS FOR GRANTING WRIT

The issue in the present case concerns directly a basic problem of American federalism: the relation of the Nation to the States in the critically important sphere of law administration. The Court of Appeals has decided a federal question in a way in conflict with the applicable decisions of this Court. Only the issue of a writ of certiorari will now give meaning to the Constitution of the United States and its statutes, and enhance respect for the equal and just application of the law in every place, at every time and to every man.

Plaintiffs have alleged that defendants, acting in concert, purposefully engaged in a forbidden conspiracy set forth in Section 1985, 42 United States Code to bring about the appointment of one of their number as receiver of Brookdale Cemetery Association, a non-profit, rural cemetery corporation, by filing fraudulent claims against such corporation, and thereafter proceeded to use, contrary to Section 1983, 42 United States Code, the power possessed by said defendant, as an officer of the State, to wrongfully change the title and ownership of certain land, and procure the allowance of said claims. And, plaintiffs have clearly shown that such actionable wrong to have fully matured, whereby plaintiffs have suffered substantial injury and all of the defendants have materially and substantially profited thereby.

Plaintiffs also charge the facts, as alleged, show defendants were conscious of wrongfully trying to influence the law, or were endeavoring to obstruct or interfere with it, and they so manipulated the law or its agencies to give sanction or sanctuary for doing so, depriving plaintiffs "of having and exercising", a federal right, which brings the case within the aforesaid Acts. The conspiracy charged is not merely that to deprive plaintiffs of rights, but of the deprivation of equality, of "equal protection of the law", or of "equal privileges and immunities under the law".

The object of Section 1983 is to protect persons against misuse of power possessed by virtue of state law and made possible because the wrongdoer is clothed with authority of state law. *Davis v. Johnson,* 138 F. Supp. 572 (D. C. Ill. 1955). Petitioners claim that the acts of defendants constituted a deprivation of their rights, privileges and immunities secured by the Constitution, within the meaning of Sections 1983 and 1985, 42 United States Code.

The aim of the aforesaid federal Acts was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice. It was not the inavailability of state remedies but the failure of the state to enforce the laws with an equal hand that brought about the enactment of the aforesaid Acts. The remedy was created against those who represented a state in some capacity who were unable or unwilling to enforce a state law. *Monroe v. Pape,* 365 U.S. 167, at pp. 174, 175 and 184.

In *Brouwer v. Kent County Clerk,* 377 Mich. 616 (1965), at pp. 643 and 644, it is said:

> "• • • the equality clause, as our judicial history tells us, is not limited only to the protection of those fundamental rights that are granted by the Federal Constitution or otherwise protected by it; rather, it extends its protective cover to all rights,

whether granted by Federal or State Constitutions, congressional or legislative enactments, executive order or otherwise, and against all forms of State action, executive, legislative, or even judicial. *Ex Parte Virginia* (1880), 100 U.S. 339 (25 L. ed. 676); *Louis K. Liggett Co. v. Lee* (1933), 288 U.S. 517 (53 S. Ct. 481, 77 L. ed. 929, 85 ALR 699); *Hillsborough Township v. Cromwell* (1946), 326 U.S. 620 (66 S. Ct. 445, 90 L. ed. 358); *Shelley v. Kraemer* (1948), 334 U.S. 1 (68 S. Ct. 836, 92 L. ed. 1161, 3 ALR 2d 441); *Wheeling Steel Corp. v. Glander* (1949), 337 U.S. 562 (69 S. Ct. 1291, 93 L. ed. 1544); *Dowd v. United States, ex rel. Cook* (1951), 340 U.S. 206 (71 S. Ct. 262, 95 L. ed. 215, 19 ALR 2d 784); *Barrows v. Jackson* (1953), 346 U.S. 249 (73 S. Ct. 1031, 97 L. ed. 1586); *Brown v. Board of Education of Topeka* (1954), 347 U.S. 483 (74 S. Ct. 686, 98 L. ed. 873, 38 ALR 2d 1180); *Pennsylvania v. Board of Directors of City Trusts of the City of Philadelphia* (1957), 354 U.S. 457 (77 S. Ct. 1344, 1 L. ed. 2d 1485). To put it another way, as the Supreme Court has:

"The controlling legal principles are plain. The command of the Fourteenth Amendment is that no 'State' shall deny to any person within its jurisdiction the equal protection of the laws. 'A State acts by its legislature, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government * * * denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning.' *Ex Parte Virginia,* 100 U.S. 339, 347

(25 L. ed. 676, 679). Thus the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action, see *Virginia v. Rives*, 100 U.S. 313 (25 L. ed. 667); *Pennsylvania v. Board of Directors of City Trusts of Philadephia*, 353 U.S. 230 (77 S. Ct. 806, 1 L. ed. 2d 792); *Shelley v. Kraemer*, 334 U.S. 1 (68 S. S. Ct. 836, 92 L. ed. 1161, 3 ALR 2d 441), or whatever the guise in which it is taken, see *Derrington v. Plummer* (CCA 5), 240 F. 2d 922; *Department of Conservation & Development, Commonwealth of Virginia v. Tate* (CCA 4) 231 F. 2d 615." *Cooper v. Aaron* (1958), 358 U.S. 1, 16, 17 (78 S. Ct. 1401, 3 L. ed. 2d 5, 19).

The District Court, before answer and before trial, granted defendants' motions to dismiss this cause on the wholly erroneous assumption the present action was brought to obtain relief from a judgment of the Supreme Court of Michigan, *Harvey v. Lewis*, 357 Mich. 305, 98 N.W.2d 599, and the parties to the State action and the parties to the present action are the same (R. 243a).

Only 5 of the present 14 defendants, namely the three Lewis brothers, Brookdale Cemetery Association and Brookdale, Inc., defunct Michigan corporations, were defendants in the prior State court proceedings (R. 1a, Plt. Exh. 42, 153a).

The Court of Appeals, under the most unusual circumstances, arbitrarily concluded an appeal from the aforesaid order to be frivolous, but it appears knowledgeable title insurance companies do not think plaintiffs' contentions are frivolous (App. A-1, infra, pp. 32, 40).

In reaching its decision the Court of Appeals relies on two principal lines of reasoning, each of which is erroneous:

1, Plaintiffs' contentions, made in the complaint, have been adjudicated against them by the Supreme Court of Michigan in *Harvey v. Lewis,* 357 Mich. 305, supra, 98 N.W.2d 599 (App. A-1, infra, pp. 32-33).

The State trial court adjudged the title and ownership of the land in question to be in plaintiffs, not as individuals, but as a corporate entity, viz. "Brookdale Cemetery Association" (R. Plt. Exh. 42, 156a, 160a), *Harvey v. Lewis,* 357 Mich. 305 at p. 312. The only issue submitted to the Supreme Court of Michigan more than three years later involved the action of the trial court in authorizing the sale of assets of Brookdale Cemetery Association, particularly of certain real estate, and the issue raised in the State circuit court under the pleadings there filed as to the legal title and ownership of the land embraced in the order of sale. That Court in *Harvey v. Lewis, supra,* 357 Mich. 305, at pp. 307 and 314, modified the decree of sale, and specifically adjudged the title and ownership of the land in question to be in Brookdale Cemetery Association, incorporated as a Michigan non-profit rural cemetery corporation pursuant to the express provisions of Brookdale Syndicate Agreement Number One, composed solely of plaintiffs (R. 12a-14a; 16a-18a, Plt. Exh. 5, 108a-109a).

The present case is upon a different, subsequent cause of action, and the controversy is genuine and present, not merely a possible or conjectural one. The parties involved in the State action and the present action are not the same. The plaintiffs claim the present suit involves a dispute or controversy respecting the validity, construction, or effect of federal laws, upon the determination of which the result depends.

In *United States Fidelity & Guaranty Co. v. McCarthy,* 33 F. 2d 7, at pp. 9 and 10, it is said:

> "* * * the inquiry must always be to the point or question litigated and determined in the original

action, not what might have been thus litigated. Only upon such matters is the judgment conclusive in another action." • • •

"But if the second case be upon a different cause of action, the prior judgment or decree operates as an estoppel upon the determination of which the judgment or decree was rendered." • • •

"In *Radford v. Myers,* 231 U.S. 725, 730, the court said: 'As the suit in the Michigan court was not upon the identical cause of action litigated in the United States Circuit Court the estoppel operates only as to the matters in issue or points controverted and actually decided in that suit.' "

The party seeking to invoke the doctrine of estoppel by judgment or collateral estoppel must show (1) that the issue which his opponent wishes to litigate has already been completely litigated and (2) that such adjudication was rendered in a proceeding where the two were adversaries. *Hellenic Lines, Limited v. The Exmouth,* 253 F.2d 473, cert denied 356 U.S. 967, 2 L.ed2d 1074.

A matter cannot be *res adjudicata* unless there be identity of the thing sued for, of the cause of action, of the person or parties, the quality of persons for or against whom the claim is made, and the judgment in former action to be so in point as to control the issue in the pending case. *Hartford Accident & Indemnity Co. v. Jasper* 144 F.2d 266.

2. Plaintiffs have had full opportunity to seek an adjudication of all issues raised in their complaint during the litigation in the State courts (App. A-1, infra, p. 32).

The right to pursue remedies under federal Civil Rights Act is not abrogated by availability of state remedies 42 USCA, Sec. 1983. *York v. Story,* 9 CA (1963), 324 F.2d 450, cert denied 85 SCt 794, 376 US 939, 11 L. ed 2d 659.

Even if plaintiff had a complete remedy in state courts, * * * plaintiff was not thereby precluded from bringing action under federal Civil Rights Act, 42 U.S.C.A., Sec. 1983. *Cohen v. Norris,* 9 CA (1956), 300 F.2d 24. Relief is not to be denied under federal civil rights statutes because of failure to exhaust available state remedies of either administrative or judicial nature. *Powell v. Workmen's Comp. Bd. of State of N.Y.,* 327 F.2d 131 (1965).

According to established doctrine, the Fourteenth Amendment itself, "speaks to the State or those acting under color of its authority", and Section 5 empowers Congress to enact laws punishing all conspiracies to interfere with the exercise of Fourteenth Amendment rights.

The benefits of the Civil Rights Acts were intended to be uniform throughout the United States, that the protection to the individual to be afforded by them was not intended by Congress to differ from state to state. *Batista v. Weir,* 3 CA (1965), 340 F.2d 74.

The law is designed as a protective shield for citizens of any color, and the violation of the civil rights of any citizen, regardless of color, affords a cause of action to that person under the statute (42 USCA, Sec. 1983). If a factual controversy exists under the allegations of the Complaint, it may not be determined on a Motion to Dismiss or Motion for Summary Judgment. *Jordan v. Kelley,* (1963), 223 F. Supp. 731.

On a motion to dismiss before trial, the district court and the Court of Appeals were obligated to treat as true all well pleaded factual allegations of the complaint in determining if an action was stated which would entitle plaintiff to relief. *Lee v. Hodges,* 4 CA (1963), 321 F.2d 480; *Duzynski v. Nosal,* 7 CA (1963), 324 F.2d 924.

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. On a motion to dismiss for failure to state a cause of action, a plaintiff is entitled to all reasonable presumptions. A conclusion by the Court of Appeals that plaintiff has not met this first test does not preclude a later summary disposition of all or part of the case when the district court comes to consider plaintiff's legal contentions in the light of appropriate findings of fact. It may be that the proof will fall short of the allegations and that even if proved they will, in their fully developed context, not attain the level of federally remedial constitutional and statutory deprivations. However, the plaintiff is entitled to his day in court and a hearing. *Lee v. Hodges,* 4 CA (1963), 321 F.2d 480, at p. 486.

In *Roberts v. Trapnell,* D.C. Pa (1962), 213 Supp. 49-51, it is said:

> "All that is necessary to prevent the dismissal of a Complaint brought under 42 USCA, Sec. 1983 is that it allege facts constituting a deprivation under color of state authority of a right guaranteed by the Fourteenth Amendment. *Monroe v. Pape* (1961), 365 U.S. 167, 171, 81 S. Ct. 473, 5 L. ed. 2d 492.
>
> See *Douglas v. City of Jeanette, Pa.,* 319 U.S. 157, 161, 162, 63 S. Ct. 877, 87 L. Ed. 1324 (1943)
>
> • • •
>
> • • • this Court is unable to state that it does not appear beyond doubt that the minor plaintiff can prove no set of facts in support of his claim which would entitle him to relief. See *Hughes v. Noble,* 295 F. 2d 495, 496 (5 Cir. 1961). He should, therefore, on the present state of the record, be given an opportunity to prove his allegations. See *Cohen v. Norris,* 300 F. 2d at pp. 32-33."

In *Marshall v. Sawyer*, 9 CA (1962), 301 F.2d 639, at pp. 646 and 647, it is said:

> "The only elements which need to be present in order to establish a claim for damages under the Civil Rights Act are that the conduct complained of was engaged in under color of state law, and that such conduct subjected the plaintiff to the deprivation of rights, privileges, or immunities secured by the Constitution of the United States. • • •"
>
> "The defendants' conduct was engaged in under color of state law if they were clothed with the authority of the state and were purporting to act thereunder, whether or not the conduct complained of was authorized, or, indeed, even proscribed by state law. *Monroe v. Pape*, 365 U.S. 167, 187, 81 S. Ct. 473, 5 L. ed. 2d 492; *Screws v. United States*, 325 U.S. 91, 111, 65 S. Ct. 1031, 89 L. ed. 1495. Whether there is 'color' of state law is a federal, not a state question." • • •
>
> "A complaint is not subject to dismissal upon a claim that the complaint does not state a claim upon which relief can be granted, unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L. ed. 2d 80."

A motion urging dismissal of an appeal on grounds that it presents no substantial question for review, is frivolous or not taken in good faith should be granted only in extreme cases. *Morrison v. Texas Company*, 7CA (1961), 289 F.2d 382; *Cohen v. Curtis Publishing Company*, 8CA (1964), 333 F.2d 974; *Davis v. F. W. Woolworth Co.*, 10CA (1931), 54 F.2d 366.

It has been heretofore established beyond contradiction that Brookdale Cemetery Association is the creature of the Brookdale Syndicate Number One agreement, a syndicate now consisting solely of plaintiffs, which furnished all of the $7,500.00 down payment necessary to acquire the land in question, subject to a $32,500.00 mortgage of record, as yet unpaid. The erroneous assumption that Defendants Lewis advanced any money for any purpose to purchase said land, not refunded, or have not been guilty of fraud, as originally charged by plaintiffs in the prior state action, *Harvey v. Lewis, supra,* 357 Mich. 305, at pp. 309 and 312, is clearly refuted by the order of the State court subsequently adjudicating them guilty of perpetrating a fraud of upwards of $89,750.00 upon Brookdale Cemetery Association (R. Plt. Exh. 33, 149a, 150a).

It has also been heretofore conclusively established that Brookdale Cemetery Association, after incorporation never authorized the issuance, or did issue any of its shares of stock to any person, firm or corporation, or lawfully engaged in the operation of any cemetery business. Its corporate powers were never lawfully revived after its Charter was immediately allowed to lapse on August 31, 1940 for failure to file any annual reports and pay any annual franchise fees pursuant to Michigan law. Similarly, the corporate powers of Brookdale, Inc., penniless and wholly without assets since incorporation, were also allowed to immediately lapse, and were never thereafter lawfully revived (R. 22a, 27a-29a, 38a).

Only plaintiffs, by virtue of their investment and syndicate membership, as was adjudicated by the state trial court, can now lawfully claim under Michigan law an equitable and beneficial ownership of the assets of defunct Brookdale Cemetery Association.

After dissolution, the receiver of a corporation obviously cannot start up a corporate business never actually previously engaged in, because there is no such corporation in contemplation of law. *Hurd v. Meyer,* 259 Mich. 190, 193. Yet, it is undisputed, as the plaintiffs charge, that contrary to Michigan law, which expressly forbids the sale of burial rights in mortgaged land (CL 1948, Sec. 456.109), and continuing, without a corporate charter, the business for which said corporation was organized (CL 1948, Sec. 450.75), Defendant John R. Starrs, as receiver of Brookdale Cemetery Association, after the aforesaid appeal, *Harvey v. Lewis, supra,* 357 Mich. 305, was submitted to the Supreme Court of Michigan, set Defendant Sydney List to selling burial rights and making upwards of 6,000 unlawful burials in said mortgaged land for upwards of $360,000.00, without making any provision whatever for the perpetual care thereof, also expressly required by Michigan law (CL 1948, Sec. 456.107, 456.107a).

Clothed with the authority of the state, and purporting to act thereunder, Defendant Starrs, as receiver of Brookdale Cemetery Association, in furtherance of the conspiracy charged, wrongfully using the power so possessed by him, also arbitrarily compromised the claim of his fellow defendant, Harris W. Wienner, for alleged services rendered Brookdale Cemetery Association and Brookdale, Inc., both defunct since 1940, submitted for the first time to further said conspiracy and never proven (R. Plt. Exh. 61, 195a-196a).

In *Powell v. Maryland Trust Co.,* 125 F.2d 260, 271, cert. denied 62 S. Ct. 1041, 316 U.S. 671, 86 L. ed, 1746, rehearing denied 62 S. Ct. 1273, 316 U.S. 711, 86 L. ed. 1777, it is said:

> "• • • it is well settled that the appointment of receivers for a corporation does not affect the rights of others to property in its possession. As

said by the Supreme Court in *Quincy etc. Railroad Company v. Humphreys,* 145 U.S. 82, 97, 12 S. Ct. 787, 36 L. ed. 632, as to the status of receivers. 'They were ministerial officers, appointed by the court of chancery to take possession of and preserve, pendente lite, the fund or property in litigation; mere custodians, coming within the rule stated in *Union Nat. Bank of Chicago v. Bank of Kansas City,* 136 U.S. 223, 236, 10 S. Ct. 1013 (34 L. ed. 341), where this court said: "A receiver derives his authority from the act of the court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed; and the utmost effect of his appointment is to put the property from that time into his custody *as an officer of the court,* for the benefit of the party ultimately proved to be entitled, *but not to change the title or even the right of possession in the property.*" ' " (Emphasis added.)

Yet, as plaintiffs allege, Defendant Starrs, as receiver of Brookdale Cemetery Association, continuing to act in concert with Defendants Lewis and Tsangadas, clothed with the authority of the state, and purporting to act thereunder, wrongfully using the power possessed by him, without consideration whatever, other than the aim of defendants to unlawfully further their said conspiracy, created a stock register for defunct Brookdale Cemetery Association and issued a single certificate, purporting to represent all of its stock, to himself as receiver of Brookdale, Inc., and likewise, as receiver, created a new stock register of defunct Brookdale, Inc., and issued certificates of stock, representing 91.7% of its purported total authorized common stock to Defendants Lewis and Tsangadas. Thus, defendants concluded their conspiracy to destroy plaintiffs' adjudicated 100% ownership of the land in question as a corporate entity.

While clothed with the authority of the State, Defendant Starrs, as receiver of Brookdale Cemetery Association, totally dissipated upwards of $417,000.00 of its cash receipts, substantnally in fees, expenses and commissions paid to himself, his counsel and Defendant Sydney List, before it was disclosed he had secretly joined with his coconspirator, Defendant Sydney List, as a partner in the Eagle Stone and Monument Company purposefully organized to more fully exploit his receivership, and he was forced to resign on October 12, 1965 (R. 87a-88a). Defendant List was paid $85,000.00. Now, in addition to his secret earnings and his previous receivership fees (R. 57a), Defendant Starrs claims additional receivership fees of $60,000.00 for the period ending February 25, 1963, and also fees, undetermined as yet, from that date until October 12, 1965 (R. 88a).

In *Phelan v. Middle States Oil Corp.*, 154 F.2d 978, at p. 991, it is said:

> "Having in mind such cases as *Cretes, Inc. v. Prudential Co.*, 322 U.S. 408, 64 S. Ct. 1075, 1079, 88 L. ed. 1356 and other cases cited below, we think the general principles applicable here are as follows: A receiver, as 'an officer or arm of the court,' is a trustee with the highest kind of fiduciary obligations. He owes a duty of strict impartiality, of 'undivided loyalty', to all persons interested in the receivership estate, and must not 'dilute' that loyalty. He is 'bound to act fairly and openly with respect to every aspect of the proceedings before the court.' * * * The court, as well as all interested parties, 'have the right to expect that all its officers,' including the receiver, will not 'fail to reveal any pertinent information or use their official position for their own profit or to further the interest of themselves or any associates.'"

In *Crites, Inc. v. Prudential Co.*, 322 U.S. 408 at p. 418, it is sad:

> "In this case, however, the fact that Simpkins entered into a fee-splitting contract so patently illegal, plus the fact that he engaged in other misconduct and indiscretion incompatible with his position as an officer of the court, compel the conclusion that all fees and compensation as a co-receiver should have been denied him. Cf. *Woods v. City National Bank*, 312 U.S. 262, 268.

Despite the fact that said land was further immediately pledged to secure a $5,000.00 loan, as plaintiffs allege, the successor receiver of Brookdale Cemetery Association, Defendant Bernard Belk, has continued to sell burial rights and bury human bodies in said mortgaged land contrary to Michigan law, CL 1948, Sec. 456.109, *supra*.

Finally, as plaintiffs also allege, based solely on the petition of Defendant Harris W. Wienner, previously established as a judgment creditor by Defendant Starrs, for a Public Sale of Assets, contrary to Michigan law, which expressly forbids such a sale, CL 1948, Sec. 623.43, *supra*, the dedicated cemetery land was sold to a corporation *yet to be organized* (R. Plt. Exh. 62, 63, 197a-202a).

CONCLUSION

Wherefore, petitioners respectfully petition this Honorable Court to issue a writ of certiorari directed to the Court of Appeals for the Sixth Circuit commanding said Court to send to this Court a full and complete transcript of the record in said Court, to the end that this cause may be reviewed by this Court, and that the judgment of the Court of Appeals for the Sixth Circuit be reversed and such other relief be granted as to this Court may seem proper.

Dated this 18th day of August, A.D., 1967.

Respectfully submitted,

AUGUST F. BRANDT,
Attorney for Petitioners,
363 St. Clair Avenue,
Grosse Pointe, Michigan 48230.

APPENDIX A-1

No. 17849

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

Emma R. Moist, et al., *Plaintiffs-Appellants*, v. Bernard Belk, Receiver for Brookdale Cemetery Association, et al., *Defendants-Appellees.*	On Motion to Dismiss Appeal from United States District Court for the Eastern District of Michigan, Southern Division.

Decided June 17, 1967.

Before O'Sullivan and Phillips, Circuit Judges, and Cecil, Senior Circuit Judge.

Phillips, Circuit Judge. This case is before the court upon defendants-appellees' motion to dismiss the appeal as being frivolous. Oral arguments have been heard and briefs submitted.

Appellees' position is that all issues pleaded in the district court have been or could have been raised in the protracted proceedings in the State courts of Michigan which began November 22, 1952, and have been contested bitterly and frequently in extended litigation since that time.

In the alternative, appellees have moved that appellants be required to execute a bond for security for costs and supersedeas bond in the amount of $500,000.00.

The articles of incorporation of Brookdale Cemetery Association, a rural cemetery association, were filed under Michigan Law September 22, 1937. Appellee is now acting as receiver of said association and an affiliated corporation, Brookdale, Inc., by decree of the Circuit Court of Wayne County, Michigan, having been appointed to succeed an earlier trustee. The State litigation began as a bill in equity, seeking relief on behalf of certain minority stockholders on charges of conspiracy and fraud. The district judge described the proceedings in the State courts as follows:

> "The original petition for receivership was filed by plaintiffs herein or their predecessors in interest . . . in the Wayne County Circuit Court on November 22, 1952 which apparently prayed for the appointment of a receiver of two corporations in which plaintiffs claimed some interest and which sought a decree quieting title to certain real property now known in part as Brookdale Cemetery. Those proceedings have continued to date and have involved a vast number of appeals to the Michigan Supreme Court, variously estimated at from twenty-two to thirty-eight, which figures do not include several additional appeals to the recently convened Michigan Court of Appeals, an intermediate appellate court."

In its reported opinion in *Harvey v. Lewis,* 357 Mich. 305, 98 N.W.2d 599, the Supreme Court of Michigan discussed the facts in some detail and adjudicated the issues there presented, holding, among other things: "the legal title to the land in question, and the ownership thereof as against any claims of the plaintiffs, to be in Brookdale Cemetery Association and subject to the jurisdiction of the court in the receivership proceeding." 357 Mich. at 314. The court further decreed "that plaintiffs have no interest of any kind or description in said land and as an asset of the corpo-

ration, and that the rights of plaintiffs are limited to such as may be possessed by them as stockholders in Brookdale, Inc. or Brookdale Cemetery Association." Ibid. at 314. The Supreme Court further held that "[I]t is apparent also from the record in the case that there was no abuse of discretion in the appointment of a receiver for these 2 corporations." Ibid. at 313. The court approved the action of the State Circuit Court in authorizing sale of the assets of the cemetery association, but with the modification that any sale of the real estate shall be subject to the condition that existing graves shall not be disturbed.

Thereafter the Receiver entered into a sale agreement for the sale of the land and assets of the cemetery for $450,000 to a newly formed corporation, with provision for continued use of the land for cemetery purposes. This sale was ratified and confirmed by the State Circuit Court of Wayne County on January 6, 1966. A copy of the order conffirming the sale is attached as Appendix A to this opinion. The sale was affirmed on appeal by the Court of Appeals of Michigan in an order entered August 25, 1966. This order is made Appendix B to this opinion.

Under date of November 9, 1966, plaintiffs filed in the United States District Court its complaint in the present case, consisting of ninety-three typewritten pages plus some seventy-seven exhibits.

Under date of January 3, 1967, District Judge Thaddeus M. Machrowicz entered an order sustaining the motion of defendants to dismiss the complaint and directed the discharge of a certain Lis Pendens therefore issued out of the case and filed with the Register of Deeds of Wayne County, Michigan.

Plaintiffs have perfected an appeal from the order of the district court dismissing their complaint.

In support of their motion for a supersedeas bond, appellees assert that the sale of the cemetery has been thwarted by this appeal because the title insurance company refuses to issue a title insurance commitment during the pendency of this appeal and the purchaser refuses to consummate the sale unless the commitment for title insurance is issued. It is further charged that plaintiffs have refused to enter into a stipulation whereby the property would be sold and the proceeds of the sale held in escrow pending the disposition of this appeal. Appellees aver that the only impedement to the sale of said real estate is the pendency of the appeal in the present case; and that if the purchaser should withdraw the offer to purchase for $450,000 because of the delay occasioned by this appeal, an irreparable loss could result.

The district court declined to require a supersedeas bond, for the reasons stated in his memorandum opinion which is attached as Appendix C hereto.

We do not find it necessary in the present case to reach the question of whether plaintiffs should be required to execute a supersedeas bond, because we have concluded that the appeal is frivolous and that the motion to dismiss the appeal should be sustained. The complaint in the present case is a substantial rehashing of issues previously litigated and settled in the courts of Michigan. It appears that plaintiffs have had full opportunity to seek an adjudication of all issues during the fifteen years of litigation in the State courts.

The first prayer of the complaint in the present case asks that title and ownership of the cemetery property be decreed by the district court to be presently in the plaintiffs. The second prayer is that the district court determine that Brookdale Cemetery Association is neither a *de jure* nor *de facto* corporation. These contentions, and others made in the complaint, have been adjudicated against plaintiff by the Supreme Court of Michigan in *Harvey v.*

Lewis, supra, 357 Mich. 305, 98 N.W.2d 599. Plaintiffs did not seek a review of that case by the Supreme Court of the United States, where they could have asserted all the constitutional rights of which they now say they were deprived.

A motion urging dismissal of an appeal on the ground that it presents no substantial question for review or is frivolous or was not taken in good faith should be granted only in extreme cases. *Cohen v. Curtis Publishing Co.,* 333 F.2d 974 (C.A. 8), cert. denied, 380 U.S. 921; rehearing denied, 380 U.S. 989. Motions to dismiss as frivolous are not favored by the courts where disposition requires the examination of a trial transcript. *Chatham Shipping Co. v. Fertex Steamship Corp.,* 352 F.2d 291 (C.A. 2). It has been held, however, that where a wholly unmeritorious appeal would frustrate the purpose of arbitration clauses, which were designed to provide speedy and economical solutions of labor disputes, the appeal may be dismissed on motion as frivolous even in the advance of the filing of a record. *Chatham Shipping Co. v. Fertex Steamship Corp., supra.* Likewise where the constitutionality of a state statute had been attacked and upheld repeatedly in both the state and federal courts, an appeal from a second application to a district court raising identical constitutional questions could be dismissed as frivolous. *Waddell v. Chicago Land Clearance Commission,* 206 F.2d 748 (C.A. 7).

The court of appeals in the exercise of its plenary power may dismiss a civil appeal as frivolous in appropriate cases. *United States v. Madden,* 352 F.2d 792 (C.A. 9); *John v. Gibson,* 270 F.2d 36 (C.A. 9), cert. denied, 361 U.S. 970; *Jimenez v. Barber,* 252 F.2d 550 (C.A. 9).

After a thorough examination of the record, we conclude that this appeal is frivolous and that the motion to dismiss on that ground must be sustained.

The appeal is dismissed.

APPENDIX A

STATE OF MICHIGAN—In the Circuit Court for the County of Wayne

Sidney M. Harvey, et al.,
Plaintiffs,
v.
Daniel Lewis, et al.,
Defendants.

Civil Action
No. 497-076

ORDER CONFIRMING SALE

At a session of said Court held in the City-County Building, in the City of Detroit, County of Wayne, and State of Michigan, on January 6, 1966.

Present: Honorable Joseph G. Rashid, Circuit Judge.

This Court having entered a Decree of Sale on October 7, 1958, and said Decree of Sale having been modified and affirmed by the Michigan Supreme Court on December 8, 1959, and said sale having been adjourned without date on January 23, 1959, and an Order Fixing Date of Sale of the assets of Brookdale Cemetery Association and Brookdale, Inc., or the stock of said corporations having been entered on November 5, 1965, and objections to said Order having been filed by the plaintiffs herein, and said sale having been conducted on December 15, 1965 at 10:00 A.M., being the time described in said Order Fixing Date of Sale, and said sale then having been adjourned to December 17, 1965 and

again to December 20, 1965, and the Receiver having filed his Report of Sale, and having requested the Court to select the proposal, which under all circumstances, would be in the best interest of the Receivership Estate, and all parties in interest having been served with true copies of the Receiver's Report of Sale and Motion to Select and Confirm Sale, and the Court having taken the Report of the Receiver as well as the proposals submitted under advisement, and the Court having been duly advised in the premises.

IT IS ORDERED AND ADJUDGED that the proposal submitted by JOHN P. BABCOCK, an attorney at law, representing A. S. GREEN, as agent for a corporation to be organized, be and the same is selected, as the proposal which under all cirmuestances appears to be in the best interest of the Receivership Estate.

IT IS FURTHER ORDERED AND ADJUDGED that the Receiver in this cause shall proceed to conclude and the sale of Brookdale Memorial Cemetery and its assets to the corporation to be organized as purchaser, as expeditiously as possible.

IT IS FURTHER ORDERED AND ADJUDGED that immediately after consummation of the sale, the Receiver in this cause shall establish from the proceeds of sale a perpetual care fund in an amount to be determined from the books of Brookdale Cemetery Association as shall by statute in such cases be required.

IT IS FURTHER ORDERED AND ADJUDGED that the perpetual care fund shall be duly administered by Trustees who shall be appointed by the purchaser forthwith upon consummation of sale.

IT IS FURTHER ORDERED AND ADJUDGED that the right of sepulchre shall in all events be continued and maintained and the purchaser shall recognize and fulfill the legal responsiblity to persons lawfully possessing rights to preneed graves in said cemetery.

IT IS FURTHER ORDERED AND ADJUDGED that all cemetery land shall be conveyed by a Receiver's Deed and free from any claims, liens and incumbrances whatsoever.

IT IS FURTHER ORDERED AND ADJUDGED that all remaining assets, except cash on hand, shall be conveyed free and clear and free from any claims, liens and incumbrances whatsoever.

IT IS FURTHER ORDERED AND ADJUDGED that the cemetery permit and all cemetery records, books, plats, diagrams or other memoranda showing grave locations, and other pertinent information necessary to enable the purchaser to continue to conduct the cemetery business on the premises be turned over to the purchaser forthwith upon the consummation of the sale.

IT IS FURTHER ORDERED AND ADJUDGED that this sale shall be consummated as expeditiously as possible but in any event not later than sixty (60) days after the Order of Confirmation of Sale becomes final.

IT IS FURTHER ORDERED AND ADJUDGED that the Receiver shall by appropriate instrument indemnify and hold the purchaser harmless from any and all claims, demands, actions, or causes of action, including all attorney's and other fees, costs and expenses incidental to the defenses thereof, arising as a result of or incidental to any act or omission by Brookdale Cemetery Association, provided, that the purchaser shall turn over to the Receiver

all such claims and process relating to such actions immediately upon receipt of same for handling by the Receiver.

IT IS FURTHER ORDERED AND ADJUDGED that the Receiver in this cause shall carry out the plan of liquidation of Brookdale Cemetery Association and Brookdale, Inc. within twelve (12) months from the date of said plan.

JOSEPH G. RASHID,
Circuit Judge.

APPENDIX B

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Detroit, on the Twenty-fifth day of August in the year of our Lord one thousand nine hundred and sixty-six.

Present the Honorable

T. JOHN LESINSKI
Presiding Judge

JOHN H. GILLIS
THOMAS G. KAVANAGH
Judges

Sidney M. Harvey, et al.
Plaintiffs-Appellants,
v.
Daniel Lewis, et al.,
Defendants-Appellees.

Calendar #1712

Upon the filing and reading of motion to dismiss appeal and, in the alternative, motion to affirm order modifying order confirming sale entered January 7, 1966 filed by the

attorney for Bernard Belk, Receiver for Brookdale, Inc. and Brookdale Cemetery Association; the appellants' answer thereto; motion to affirm order of sale filed on behalf of the estate of Daniel Lewis, deceased, Jean K. Lewis and George Lewis, defendants and appellees; appellants' answer thereto; the reply of the Lewis brothers; the replication of appellants to the reply of the Lewis Brothers; and plaintiffs and appellants' brief on appeal, and the Court, being fully advised in the premises,

IT IS HEREBY ORDERED that the order of the trial court modifying the order confirming sale entered January 7, 1966 be and is hereby affirmed.

This order is entered pursuant to GCR 817.5(3), the Court having found that it is manifest that the question or questions sought to be reviewed on which decision of the cause or matter depends, are so unsubstantial as to need no argument or formal submission.

The Court further notes its displeasure in the receiving of a brief on appeal and other pleadings of appellants containing an unprofessional presentation of position and unnecessary discourteous reference to the trial court.

APPENDIX C

UNITED STATES OF AMERICA
IN THE DISTRICT COURT FOR THE
UNITED STATES
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Emma R. Moist, individually and as assignee of Sidney M. Harvey, and William T. McAlonon, et al., *Plaintiffs,* v. Bernard Belk, as Receiver of Brookdale Cemetery Association and Brookdale, Inc., alleged Michigan Corporations, et al., *Defendants.*	Civil Action No. 29165

OPINION RE: RECEIVER'S MOTION FOR SECURITY FOR COSTS AND SUPERSEDEAS BOND

At a session of said court held in the Federal Building in the City of Detroit, County of Wayne, and State of Michigan, on March 31, 1967.

Present: HON. THADDEUS M. MACHROWICZ
United States District Judge

The defendant, BERNARD BELK, Receiver of Brookdale Cemetery Association and Brookdale, Inc., brought a Motion before this Court for Security for Costs and Supersedeas Bond after the plaintiffs filed a Notice of Appeal

from an Order of this Court dismissing their Complaint and discharging Notice of Lis Pendens. The undisputed facts are that the Defendant, BERNARD BELK was informed on or about March 8, 1967, that the Title Insurance Company would not issue a Commitment for Title Insurance due to the pendency of plaintiffs' appeal. Plaintiffs have not requested a Stay or an Injunction restraining the sale of Brookdale Cemetery pending appeal but counsel for plaintiffs stated in open Court that he would not stipulate to an order permitting the sale to proceed and holding the funds in escrow pending appeal and further, that plaintiffs did not desire to see the sale consummated.

The defendant BERNARD BELK alleged that there would be irreparable harm to the Receivership of Brookdale Cemetery if this Court refused to Order a Bond as prayed for by defendant BELK. The defendant's allegation of irreparable harm is based upon his assertion that the Receivership Estate would lose interest on the proceeds of the sale which was confirmed by the Wayne County Circuit Court in the amount of $450,000. The defendant BELK further fears that should the purchaser refuse to consummate the sale due to the delay caused by the Appeal, there will be further damages to the Receivership Estate.

The Court is convinced that the Appeal filed by the plaintiffs may very well cause irreparable harm to the defendants but the Court is of the opinion that there is no authority in the Statutes or Court Rules permitting a bond to be fixed where the losing parties have not themselves requested a formal Stay or an Injunction pending Appeal. Defendant BERNARD BELK has urged upon the Court the theory that this Appeal which includes a challenge to the Court's ruling that the Notice of Lis Pendens must be discharged, has the effect of granting the plaintiffs a Stay

without their having to make a formal request. Again, the Court agrees that by filing their Appeal, the plaintiffs are obtaining what they really desire, namely a delay of of a prevention of the sale but the court has not been able to find authority for the proposition that it may Order a Bond in the absence of a formal request for a Stay filed by the plaintiffs.

Accordingly an Order Denying the Receiver's Motion for Security for Costs and Supersedeas Bond will be entered.

/s/ THADDEUS M. MACHROWICZ
United States District Judge

LIBRARY
SUPREME COURT, U. S.

No. 609

Office-Supreme Court, U.S.
FILED
OCT 9 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

EMMA R. MOIST, etc., et al.,
Petitioners,

v.

BERNARD BELK, etc., et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

BRIEF IN OPPOSITION BY RESPONDENTS STARRS AND BEATTIE

JOHN R. STARRS,
Respondent Pro Se,
1632 Buhl Building,
Detroit, Michigan 48226.

ROBERT E. PLUNKETT,
Attorney for Respondent Beattie,
1000 Guardian Building,
Detroit, Michigan 48226.

Interstate Brief & Record Co., 356 E. Congress St., Detroit, Michigan 48226
WO. 2-8745—WO. 2-8732

SUBJECT INDEX

	Page
Brief of Respondents Starrs and Beattie in Opposition to Petition for Certiorari	2-7
Reasons for Denying Writ	4-7
Conclusion	7
Appendix A—Order Allowing Receiver's Account and Petition for Compensation: Order Allowing Compensation to Receiver's Counsel: Order Embodying Settlement as Agreed by Contesting Parties	9-14

INDEX TO AUTHORITIES CITED

Allegheny College v. National Chautauqua County Bank of Jamestown, 246 N.Y. 369, 159 N.E. 173, 57 A.L.R. 980, 982 (1927)	2
Attorney General v. Taggart, 306 Mich. 432, 11 N.W. 2d 193 (1943)	6
Harvey v. Lewis, 357 Mich. 305, 98 N.W. 2d 599	4
Marquez v. Aviles, 252 Fed. 2d 715, 716 (1st Circuit, 1958)	6
Worley v. Dunn, 252 Fed. 2d 712, 714 (certiorari denied, 358 U.S. 848)	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. .....

EMMA R. MOIST, individually and as assignee of Sidney M. Harvey and William T. McAlonan; LOUISE C. KUSHIGIAN, Administratrix of the Estate of Thermie K. Henkle, deceased; GEORGIANA S. WHITMAN, survivor of herself and Henry R. Whitman, deceased, and EVELYN M. SANDERS, Special Administratrix of the Estate of Muriel Miller, deceased,

Petitioners,

versus

BERNARD BELK, individually and as alleged "Receiver" of Brookdale Cemetery Association and Brookdale, Inc., alleged Michigan corporations, GEORGE LEWIS, individually and as survivor of himself and Daniel Lewis and Saul Lewis, both deceased, formerly co-partners doing business as Lewis Brothers and as Lewis Bros., Inc., Lewis Brothers Memorial Chapel, Daniel Lewis & Brothers, Lewis-Bros. Funeral Directors, Inc., and Mt. Sinai Memorial Cemetery Association, CHARLOTTE L. KLINE, Administratrix of the Estate of Saul Lewis, deceased, NAOMI V. HILSEN and RICHARD E. MANNING, successor administrators, duly appointed of the Estate of Daniel Lewis, deceased, BROOKDALE CEMETERY ASSOCIATION, an alleged Michigan Rural Cemetery Association, BROOKDALE, INCORPORATED, an alleged Michigan Profit corporation, CONSTANTINE A. TSANGADAS, JOHN R. STARRS, STANLEY E. BEATTIE, RALPH W. McKENNEY, SYDNEY LIST, DAPHNE LIST, JAMES M. WIENNER, Administrator of the Estate of Harris W. Wienner, deceased, and DEPARTMENT OF COMMERCE, formerly Corporation and Securities Commission, of the State of Michigan,

Respondents.

BRIEF OF RESPONDENTS STARRS AND BEATTIE IN OPPOSITION TO PETITION FOR CERTIORARI

The "Statement" in the Petition for Writ of Certiorari (pages 5-13) hardly conforms either to the Mandate of Rule 23(1)(e) to present "the facts material to the consideration of the questions involved" or to the requirement of Rule 23(4) for a presentation "with accuracy, brevity and clearness whatever is essential".

Second-generation lawyers are taking over this litigation, bringing to mind the observation of Cardozo, J., in *Allegheny College v. National Chautauqua County Bank of Jamestown*, 246 N.Y. 369, 159 N.E. 173, 57 A.L.R. 980, 982 (1927):

> "The half-truths of one generation tend at times to perpetuate themselves in the law as the whole truths of another, when constant repetition brings it about that qualifications, taken once for granted, are disregarded or forgotten."

The "qualifications * * * disregarded or forgotten" in the "Statement", so far as Respondent Starrs is concerned are, simply, these: No act of Respondent Starrs as Receiver took place without its having been preceded by a petition to the Trial Court, formal objections thereto by Petitioners herein, argument, entry of order by the Trial Court, appeal by Petitioners to the Michigan Supreme Court, and dismissal or denial of appeal. Thus the constantly-repeated charge in the "Statement" that Respondent Starrs acted in a described manner, "wrongfully using the power possessed by him as Receiver", is seen to be divergent from fact. As for fees, described at page 12 of the

Petition as "exorbitant", careful examination of the Record will disclose that a $12,500 fee was paid Respondent Starrs in 1959, following petition to the Trial Court, objections by Petitioners herein, entry of order, appeal to Michigan Supreme Court under Calendar number 48,332, and order dismissing the appeal by the Supreme Court on November 24, 1959, with no petition for certiorari to this Court following. Examination of the record will also disclose that while at page 12 of the Petition, it is charged that Respondent Starrs "now claims additional fees of $60,000", petitioners herein, along with all other litigants, agreed (Appendix A hereto) to such fees (which have not yet been paid). Many, but not all, of the orders authorizing Respondent Starrs to perform the acts which are now alleged to be part of a conspiracy to deprive petitioners of their civil and constitutional rights, are reproduced in the record as printed for use of the court below and filed with this court under Rule 21(4).

There was a summary judgment entered in the Trial Court in favor of Respondent Starrs. Petitioners' "Statement", at page 12, indicates only that they are appealing from orders dismissing their Complaint. Whether they intend to appeal from such Summary Judgment, *quaere,* but simple prudence dictates recognition at this point that Respondent Starrs has been served with the petition, indicating dissatisfaction, however clumsily expressed, with the results below, at least *vis-a-vis* him.

REASONS FOR DENYING WRIT

"Do go on," T. S. Eliot has his psychiatrist say in *The Cocktail Party*, "you tell me a great deal by what you do not say."

The petition herein tells a great deal by what it does not say.

It does not say that in 1959 a decree quieting title to the premises involved herein was entered by the Supreme Court of Michigan following opinion reported in *Harvey v. Lewis*, 357 Mich. 305, 98 N.W. 2d 599. No petition for certiorari followed.

It does not say that in 1961 petitioners sought to vacate the 1959 decree of the Supreme Court on the ground it violated their constitutional rights. It does not say that such petition to vacate was denied and that no attempt at certiorari was made.

It does not say that in early 1963, all the parties litigant in the basic case, excluding the court appointees (the Receiver, his Counsel, and the Guardian Ad Litem) and mere claimants, settled their differences by a consent order, copy of which is appended hereto as Appendix A, by the terms of which certain matters were "finally and conclusively determined" as follows:

1. The account of Respondent Starrs as Receiver through June 30, 1962, was allowed as stated;
2. The petition of Respondent Starrs for fees as Receiver was allowed in the sum of $60,000 for the period ending February 25, 1963, fees for his counsel, Respondent Beattie, were allowed in the sum of $26,500 for the period ending February 23, 1963;

3. Respondent Starrs' petitions for assessment of special costs against plaintiffs in both trial and Supreme Courts were dismissed with prejudice; Respondent Starrs' petition for collection of indebtedness from Respondents Lewis and for sale of their stock in one of the litigant corporations was dismissed with prejudice; Respondent Starrs' claim against the Estate of one of the Respondents Lewis was dismissed with prejudice; Respondents Lewis' petition for recomputation of indebtedness was dismissed with prejudice;

4. Legal and equitable title to the premises involved in this litigation, as determined by the Supreme Court Decree of December 8, 1959, was found to be in Brookdale Cemetery Association, "free of the claims of any of the parties hereto in said land, except that of John R. Starrs as Receiver";

5. The percentages of interest of the real parties litigant was adjusted;

6. Paragraphs 12 and 13 of such order recite:

> "12. That this Order adjudicating the rights of the parties beneficially entitled to ultimate distribution is entered upon the consent of all of the parties entitled to ultimate distribution, to the end that each of said parties shall, as against the others of said parties, quietly enjoy and receive upon ultimate distribution, the stated percentages.
>
> "13. That if there be conflict in this Order with any prior order of this Court, the provisions hereof shall govern notwithstanding.''

It does not say that no attempt, abortive though such might be, to appeal from Appendix A, was ever made.

No claim has ever been made that Appendix A, which raised the percentage interest of petitioners from 6.25% in Brookdale, Inc. (a holding company) to 35%, was entered by reason of anything except the consent of all the parties, freely arrived at. The record discloses that the Trial Judge insisted upon petitioners being present in Court in person and placing their consents on the record before Appendix A was entered.

The claim of constitutional rights being violated has been made and denied, and no attempt at certiorari from such denial has been made these six long years. As observed in 1958 by the Sixth Circuit in *Worley v. Dunn*, 252 Fed. 2d 712, 714 (certiorari denied, 358 U.S. 848):

> "When litigants have had their day in court and a final judgment entered, the successful party and the court should not be burdened with successive efforts thereafter to relitigate the same issues."

If, for the purposes of argument, we presume that there was no hearing on the rights question, the action of petitioners in approving the settlement agreement embodied in Appendix A precludes them, by elementary rules of estoppel, from raising such issues in the District Court or, *a fortiori*, in the Court of Appeals or in this Court.

Petitioner's claim of denial of due process assumes in their favor the very point of local property law decided against them many years ago. See *Marquez v. Aviles*, 252 Fed. 2d 715, 716 (1st Circuit, 1958).

The comment of the late Justice Butzel of the Michigan Supreme Court in *Attorney General v. Taggart*, 306 Mich. 432, 11 N.W. 2d 193 (1943) comes to mind:

> "In various ways, it has been sought to impress upon the court the thought that this is an extremely important case, upon the outcome of which depend the rights and privileges not only of the immediate parties, but of many others. * * * It has been well

> said: 'For a party (and sometimes for his counsel), litigation has more refractory power than any other medium.' Human nature being what it is, all those definitely interested in the outcome as partisans of either side tend to become victims of an autogenous hemiopia rooting in their personal emotions, which firmly establishes the conviction that their own side is obviously and completely right * * *."

Respondent Beattie was the court-appointed counsel for Respondent Starrs. Respondent Beattie's activities were all performed as such counsel. Everything said concerning the position of Respondent Starrs is, *a fortiori*, applicable to the activities of Respondent Beattie.

CONCLUSION

It is submitted that the District Court was right when it dismissed the Complaint as to Respondent Beattie and entered a Summary Judgment in favor of Respondent Starrs. Its opinion (R. 242a-251a; not appended to the petition for certiorari) sets forth the reasons succinctly.

It is submitted that the Court of Appeals was right when it dismissed the appeal as frivolous (Appendix A-1 to petition for certiorari; pages 29-31).

The matter being almost a classic case of *res adjudicata*, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN R. STARRS,
Respondent pro se,
1632 Buhl Building,
Detroit, Michigan 48226.

ROBERT E. PLUNKETT,
Attorney for Respondent Beattie,
1000 Guardian Building,
Detroit, Michigan 48226.

Detroit, October 6, 1967.

APPENDIX A

STATE OF MICHIGAN

In the Circuit Court for the County of Wayne
in Chancery

Sidney M. Harvey, et al.,
Plaintiffs,
v.
Daniel Lewis and George Lewis, et al.,
Defendants.
No. 497-076

ORDER ALLOWING RECEIVER'S ACCOUNT AND PETITION FOR COMPENSATION: ORDER ALLOWING COMPENSATION TO RECEIVER'S COUNSEL: ORDER EMBODYING SETTLEMENT AS AGREED BY CONTESTING PARTIES

At a session of said Court held at the City-County Building in the City of Detroit, on March 5, 1963.

Present: Honorable Joseph G. Rashid, Circuit Judge.

In this cause after certain adjournments there came before the Court on February 25, 1963, various Petitions and Motions: Receiver's Account from inception of receivership to June 30, 1962, dated December 31, 1962; Receiver's Petition for Compensation, dated December 31, 1962; Petition of Receiver's Counsel for Compensation, dated December 29, 1962; Receiver's Petition for Order as to collection of indebtedness of Lewis Brothers, dated June 21, 1962;

Petition by Lewis Brothers for reduction and recomputation of indebtedness, dated December 26, 1962; Petition by Lewis Brothers for Order re assessment of costs against plaintiffs, dated January 26, 1963; Petition by Lewis Brothers for appointment of appraisers, dated January 26, 1963; Prayer by Constantine A. Tsangadas re assessment of costs against the plaintiffs, dated January 30, 1963; the said Petitions came before the Court upon said adjourned date after due notice;

The parties appearing were plaintiffs and their successors in interest, by Walter M. Nelson, Clarence T. Wilson and Earl Sullivan, their counsel; the Lewises and their successors in interest by Arthur M. Lang and Richard E. Manning, their counsel; Constantine A. Tsangadas, in pro per; the Receiver personally; and Stanley E. Beattie, Receiver's counsel and in pro per.

Thereby were represented all petitioning parties and the entire equity ownership of the receivership assets;

The Court on said February 25, 1963, as theretofore, received into Chambers the said parties for consideration of all the pending Petitions above referenced and of terms of possible settlement of the issues existing between the contesting parties above named; the parties came to an agreement resolving all outstanding issues as between them and thereafter in open court stated their agreement reached upon the record;

Now Therefore, pursuant to the agreement reached by the parties above named as to all outstanding issues, the Court orders that the rights of all parties above named, insofar as the following adjudications extend, are finally and conclusively determined as follows:

1.

That the Account of John R. Starrs, Receiver herein, for the period since commencement of his receivership to and including June 30, 1962, is allowed as stated; *provided*

that inadvertent omission of reference in said Account to Harris W. Wienner as ordinary creditor of Brookdale Cemetery Association is corrected and the said Harris W. Wienner is recognized, as heretofore by Order of Court he has been recognized, as claimant in the sum of $15,000.00;

2.

That the Petition of John R. Starrs for compensation for the period December 15, 1958 to and including (by oral amendment of Petition) February 25, 1963, is allowed in the sum of $60,000, to be paid when funds are available therefor in whole or in part, with interest on any sum unpaid as of January 1, 1964 to run from said date last mentioned at the rate of 5% per annum;

3.

That the Petition of Stanley E. Beattie, counsel for Receiver, for compensation of the services of himself and of his law associate, Thomas C. Mayer, for the period from December 10, 1959 to (by oral amendment of Petition) February 23, 1963, is allowed in the sum of $26,500 less a credit for sums paid on account thereof in the sum of $3,500, in the net sum of $23,000, to be paid when funds are available therefor in whole or in part, with interest on any sum unpaid as of January 1, 1964, to run from said date last mentioned at the rate of 5% per annum;

4.

That prayers pending for assessment of special and extraordinary costs as against plaintiffs, whether contained in the Petition of the Receiver's counsel for compensation, or in the Petition of defendants Lewis, or in the prayer of defendant Tsangadas, be and they are hereby dismissed with prejudice;

5.

That bills of costs proposed in the Supreme Court by the Receiver in causes numbered 48,011, 48,040, 48,041, 48,042, 48,164, 48,279, 48,332, 48,336, 48,376, 48,728, 49,055, 49,399, 49,400, bearing date December 21 1962, and proposed for settlement on December 31, 1962, shall be withdrawn and if the same have already been taxed shall be vacated by the Receiver, with prejudice;

6.

That the Receiver's Petition for collection of indebtedness from the defendants Lewis and for sale of the stock of defendants Lewis, shall be dismissed with prejudice and the claim filed by the Receiver in the Estate of Daniel Lewis in Probate Court for the County of Wayne, cause No. 472,886, shall be dismissed with prejudice;

7.

That the Petition of the defendants Lewis for a credit on indebtedness and for recomputation of indebtedness, shall be dismissed with prejudice, the same being now moot;

8.

That nothing in this Order Approving Settlement shall be construed as a realization by the Receiver of the amounts of debt heretofore claimed by the Receiver as against any party to this Order, it being hereby expressly determined that the provisions of this Order represent a compromise of the claims of the respective parties, which compromise has been realized and made possible by adjustment of the claims of ownership of the respective equity owners as hereinafter stated;

9.

That the Petition by the defendants Lewis for the appointment of appraisers of the real estate property embraced in this receivership, shall be dimissed with prejudice; *provided,* however, that any party of interest may subsequently petition this Court for appointment of appraisers if good cause be shown therefor;

10.

That the legal and equitable title to the land embraced within this receivership, as determined by Decree of the Supreme Court of Michigan dated December 8, 1959, cause 48,011, is in Brookdale Cemetery Association, a Michigan rural cemetery association, free of the claims of any of the parties hereto in said land, except that of John R. Starrs as Receiver of said Brookdale Cemetery Association;

11.

That the parties solely entitled to ultimate distribution of the avails of sale of assets of this receivership, after payment of expenses of administration of the Receivership, of taxes, and of common creditors, are herewith stated by identity and amount; $7,000, without interest, to plaintiff, Emma Moist, as a common subordinated creditor. And thereafter: 35% to plaintiffs or their successors in interest; 30% to defendants Lewis or their successors in interest; 35% to Constantine A. Tsangadas or his successors in interest; *provided,* that nothing herein contained shall affect or discharge the right of said Constantine A. Tsangadas to collection, as a common creditor, of the sum of $560.00 plus $8.00 costs awarded him as against Brookdale Cemetery Association in the Common Pleas Court for the City of Detroit, cause No. 2512448, said Judgment having been transcribed to Circuit Court of Wayne County, cause 48986;

12.

That this Order adjudicating the rights of the parties beneficially entitled to ultimate distribution is entered upon the consent of all of the parties entitled to ultimate distribution, to the end that each of said parties shall, as against the others of said parties, quietly enjoy and receive upon ultimate distribution, the stated percentages;

13.

That if there be conflict in this Order with any prior Order of this Court, the provisions hereof shall govern notwithstanding.

Joseph G. Rashid,
Circuit Judge.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 9 1967
JOHN F. DAVIS, CLERK

No. 609

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

EMMA R. MOIST, etc., et al.,
Petitioners,

v.

BERNARD BELK, etc., et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

BRIEF OF CONSTANTINE A. TSANGADAS, ONE OF THE RESPONDENTS OPPOSING THE PETITION FOR WRIT OF CERTIORARI

CONSTANTINE A. TSANGADAS,
Respondent in pro. per.,
2026 Dime Building,
Detroit, Michigan 48226.

Interstate Brief & Record Co., 356 E. Congress St., Detroit, Michigan 48226
WO. 2-8745—WO. 2-8732

SUBJECT INDEX

	Page
I. Opinion Below	2
II. Jurisdictional Statement	2
III. Question Presented for Review	2
IV. Constitutional Provision and Statutes Involved	3
V. Statement	3-4
VI. Reasons for Denying Writ	4-5
Conclusion	5
Appendix A—Memorandum Opinion and Order Granting Motions to Dismiss and Motions for Summary Judgment	7-15
Appendix B—Decree of Michigan Supreme Court	15-18
Appendix C—Plaintiffs' Petition to Vacate Supreme Court Opinion Dated October 12th, 1959 (357 Mich. 305) and Decree Dated December 8th, 1959 for Want of Jurisdiction	19
Appendix D—Order Denying Motion to Vacate	20

SUBJECT INDEX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. .....

EMMA R. MOIST, individually and as assignee of Sidney M. Harvey and William T. McAlonan; LOUISE C. KUSHIGIAN, Administratrix of the Estate of Thersie K. Henkle, deceased; GEORGIANA S. WHITMAN, survivor of herself and Henry R. Whitman, deceased, and EVELYN M. SANDERS, Special Administratrix of the Estate of Muriel Miller, deceased,

Petitioners,

versus

BERNARD BELK, individually and as alleged "Receiver" of Brookdale Cemetery Association and Brookdale, Inc., alleged Michigan corporations, GEORGE LEWIS, individually and as survivor of himself and Daniel Lewis and Saul Lewis, both deceased, formerly co-partners doing business as Lewis Brothers and as Lewis Bros., Inc., Lewis Brothers Memorial Chapel, Daniel Lewis & Brothers, Lewis Bros. Funeral Directors, Inc., and Mt. Sinai Memorial Cemetery Association, CHARLOTTE L. KLINE, Administratrix of the Estate of Saul Lewis, deceased, NAOMI V. HILSEN and RICHARD E. MANNING, successor administrators, duly appointed of the Estate of Daniel Lewis, deceased, BROOKDALE CEMETERY ASSOCIATION, an alleged Michigan Rural Cemetery Association, BROOKDALE, INCORPORATED, an alleged Michigan Profit corporation, CONSTANTINE A. TSANGADAS, JOHN R. STARRS, STANLEY E. BEATTIE, RALPH W. McKENNEY, SYDNEY LIST, DAPHNE LIST, JAMES M. WIENNER, Administrator of the Estate of Harris W. Wjenner, deceased, and DEPARTMENT OF COMMERCE, formerly Corporation and Securities Commission, of the State of Michigan,

Respondents.

BRIEF OF CONSTANTINE A. TSANGADAS, ONE OF THE RESPONDENTS OPPOSING THE PETITION FOR WRIT OF CERTIORARI.

Comes now Constantine A. Tsangadas, one of the individual Respondents herein, and in opposition to plaintiffs' petition for writ of certiorari, says:

I.

OPINION BELOW

Plaintiffs are, by Rule 23, section 1(a), required to append to their petition all "opinions delivered in the courts below." The opinion of the District Court granting this defendant's motion for summary judgment has been referenced but not appended. Defendant appends it as Appendix A hereto.

II.

JURISDICTIONAL STATEMENT

This defendant agrees that plaintiffs purport to be proceeding under 28 USCA §1254, 62 Stat. 928.

III.

QUESTION PRESENTED FOR REVIEW

This defendant agrees with the statement of plaintiffs of the question presented for review.

IV.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

This defendant agrees that the cited constitutional and statutory provisions cited by plaintiffs are allegedly involved herein.

V.

STATEMENT

The eight-page "Statement" by plaintiffs is so replete with half-truths and misstatements that this defendant is loathe to begin a detailed dissection thereof. Suffice it to say that the non-denial of certain matters set forth in the "Statement" is based upon the presence of this defendant's motion for summary judgment; yet the "Statement" includes many non-facts, many opinions, many matters specifically contradicted by plaintiffs' own pleadings. Admission of facts properly pleaded, for the purpose of a motion for summary judgment, cannot, under our jurisprudence, be transmuted into an admission of improperly pleaded conclusions and opinions. But since the opinion of the District Court, Appendix A hereto, shows the positive lack of jurisdiction in the District Court, certain references thereto will not be amiss.

Plaintiffs' counsel conceded on the record that the State Court had jurisdiction over the subject matter of the receivership and had *in personam* jurisdiction over the parties therein (pp. 9 & 14, Appendix A hereto).

Plaintiffs' counsel conceded on the record that plaintiffs, despite counsel's urging failed to seek review of the State Court action, which allegedly violated their civil and constitutional rights. This failure was knowing and deliberate, and unexplained on the record (pp. 9 & 14) Appendix A hereto).

For reasons noted by the District Court, plaintiffs thus admitted themselves out of court. It would serve no useful purpose for this defendant to repeat the points made by the District Judge, concurred in by the Court of Appeals.

VI.

REASONS FOR DENYING WRIT

Petitioners have failed to comply with rule 23, section 4 in that their "Statement" is neither accurate, brief, nor clear.

Their statement is inaccurate because it fails to disclose what the exhibits to the original complaint disclose: that all of the action of the Receiver of which complaint is made was taken pursuant to orders of the State Court, all of which were appealed by plaintiffs, and in none of which appeals plaintiffs prevailed.

Their statement is inaccurate in that it fails to disclose the decree of the Michigan Supreme Court entered December 8, 1959, and recorded with the Register of Deeds for Wayne County on December 11, 1959 in Liber 14110 at page 606, Wayne County Records, and appended hereto as Appendix B, from which decree no petition for certiorari to this court was ever filed.

Their statement is inaccurate in that it fails to disclose their own petition to vacate the Michigan Supreme Court Decree, the relevant text of which is appended hereto as Appendix C, on page 11 of which appears the following language:

> "8. * * * by proceedings hereinabove specified and referred to plaintiffs have been and are deprived of the equal protection of the Laws and of due process of law in violation of constitutional provisions as follows * * *"

Their statement is inaccurate in that it fails to disclose that their own petition to vacate (Appendix C hereto) was denied by order of the Michigan Supreme Court entered June 28, 1961, copy of which order is appended hereto as Appendix D, and that no petition to this Court for a writ of certiorari was ever filed.

Their statement is not brief.

Their statement is not clear in that, as the District Judge observed of their original Complaint, it is "so verbose, confused and redundant that its true substance, if any, is well disguised" (p. 7, Appendix A hereto).

Petitioners have not made out any Federal question at all, let alone any substantial Federal question. What the record plainly discloses from the bald admission of their counsel is that if they had any federal question they failed to ask that it be reviewed (p. 7, Appendix A hereto).

Further matters need no discussion.

CONCLUSION

The petition should be denied, with costs.

Done at Detroit, this 6th day of October, 1967.

.....

CONSTANTINE A. TSANGADAS,
Respondent In Pro. Per.,
2026 Dime Building,
Detroit, Michigan 48226.

APPENDIX A

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

Emma R. Moist, et. al.
Plaintiffs,
v.
Bernard Belk, et. al.,
Defendants.
Civil Action No. 29,165

MEMORANDUM OPINION AND ORDER GRANTING MOTIONS TO DISMISS AND MOTIONS FOR SUMMARY JUDGMENT

Dated at Detroit, Michigan this 22nd day of December, 1966.

This action was commenced on November 9, 1966, upon the filing of a complaint which named as defendants twelve individuals, two "alleged corporations" and the Michigan Department of Commerce. Each of the defendants named are alleged in the complaint to have participated at some time at present or in the past in the State court receivership proceedings involving certain real property. Defendants herein are charged with conspiracy to violate and with substantive violations of plaintiffs' Constitutional rights to due process and equal protection as guaranteed by the Fourteenth Amendment. Motions to dismiss were filed on behalf of all defendants and alternative motions for summary judgment were filed on behalf of some of the defendants.

The motions came on for full hearing on December 12, 1966, at which the following uncontested matters were brought to the court's attention. The original petition for receivership was filed by plaintiffs herein or their predecessors in interest (hereinafter referred to as plaintiffs) in the Wayne County Circuit Court on November 22, 1952 which apparently prayed for the appointment of a receiver of two corporations in which plaintiffs claimed some interest and which sought a decree quieting title to certain real property now known in part as Brookdale Cemetery. Those proceedings have continued to date and have involved a vast number of appeals to the Michigan Supreme Court, variously estimated at from twenty-two to thirty-eight, which figures do not include several additional appeals to the recently convened Michigan Court of Appeals, an intermediate appellate court.

The present action was brought to obtain relief from a judgment rendered by the Michigan Supreme Court, reported as *Harvey v. Lewis,* 357 Mich. 305 (1959) which affirmed the appointment of a receiver of two corporations, Brookdale Cemetery Association, a Michigan rural cemetery association and Brookdale, Inc., a Michigan corporation, determined that title to the real property in question was in the receiver of these two corporations and not in plaintiffs, and affirmed the findings of the trial court that the alleged conspiracy and fraud involving the formation of a syndicate, acquisition of the property in question and formation of the corporations involved and conduct of rural cemetery by the cemetery association had not been established by plaintiffs.

One of the grounds urged in the present motions is that the doctrine of res adjudicata must operate to bar this court's consideration of plaintiffs' contentions which were fully litigated in the State court proceedings. At the December 12 hearing, plaintiffs' counsel conceded on the record that the State court had jurisdiction over the subject matter of the receivership and had *in personam* jurisdiction over

the parties therein, all of whom are parties to the present action with the possible exception of the Michigan Department of Commerce. However, plaintiffs contend that the State court judgment is not res adjudicata of the issues determined therein and does not bar this court's consideration of those same issues because the State court judgment is *void* as a matter of law in that it is in direct violation of *State* law and, as such, denies to plaintiffs the equal protection of law as guaranteed by the Fourteenth Amendment.[1]

Plaintiffs' counsel also conceded certain other matters on the record at the December 12 hearing. He stated that his clients had been represented by counsel of their choice during the entire State court proceedings and that they did fail to seek review of the allegedly void 1959 Michigan Supreme Court decision by application to the United States Supreme Court. This failure to seek such review was knowing and deliberate on the part of plaintiffs inasmuch as they were aware then of the same Constitutional issues which they are raising herein, and were advised by their present counsel to seek such ultimate review of the alleged violation of their constitutional rights which they are challenging herein.[2] Furthermore, plaintiffs' counsel also stated

---

[1] See Appendix A, attached hereto, containing an excerpt of the transcript of the December 12 proceedings at which plaintiffs' counsel stated his position in this regard on the record.

[2] Plaintiffs' present counsel informed the court on the record at the December 12 hearing that he had carefully followed and studied the State Court proceedings as they progressed because of his great interest in the issues raised therein. Although he stated he had no formal connection with the case at the time of the 1959 Michigan Supreme Court decision, he nevertheless was of the opinion that the decision was unconstitutional and he urged counsel representing plaintiffs at that time to appeal the decision to the United States Supreme Court. Plaintiffs' failure to heed such advice is unexplained on this record, but it is clear that their counsel had been so advised and could have sought such review if he had considered it in his clients' best interests.

that each and every issue which plaintiffs are raising herein either was formally raised in the State court proceedings or could have been raised therein if plaintiffs' counsel had wished to do so.[3]

These facts and circumstances describe the classic situation for the application of the doctrine of *res judicata*. Perhaps the most compelling reason for the use of this doctrine is to bring an eventual end to litigation, so that in the orderly course of judicial administration, issues once litigated and controversies once resolved may not be subsequently reopened. It appears to the court that this is precisely what plaintiffs are attempting to do in this cause, to relitigate claims which have already been decided by the State courts of competent jurisdiction adversely to plaintiffs. Whether, as plaintiffs claim, the 1959 Michigan Supreme Court decision denied them equal protection of the law by incorrectly applying State law is not before the court at this time. If such decision violated plaintiffs' constitutional rights, their only relief would have been to seek direct review in the United States Supreme Court. This procedure they deliberately waived. They cannot now be heard anew on this same claim in federal district court. As the court pointed out in *Rhodes v. Meyer*, 334 F.2d 709 (8th Cir. 1964), cert. denied 379 U.S. 915 (1964), the Civil Rights Act was not intended to allow persons knowledgeable in legal procedures to ignore an opportunity to correct an alleged error and then, in subsequent proceedings, attack the administration of justice.

And apart from the Civil Rights Act, the United States Supreme Court has unequivocally held that the federal

---

[3] Plaintiffs' petition for rehearing, formally entitled "motion to vacate", filed in the Michigan Supreme Court subsequent to its 1959 decision, raised the constitutional issues of denial of due process and equal protection.

district courts do not have original jurisdiction to entertain actions brought by litigants defeated in the State courts against successful opponents to set aside the State court judgment as void because of alleged errors in deciding constitutional questions. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923).

> It affirmatively appears from the bill that the judgment was rendered in a cause wherein the (state) court had jurisdiction of both the subject matter and the parties; that a full hearing was had therein; that the judgment was responsive to the issues, and that it was affirmed by the Supreme Court of the State on an appeal by the plaintiffs. . . . If the constitutional questions stated in the bill actually arose in the cause, it was the province and duty of the state courts to decide them; and their decision, whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication. . . . Under the legislation of Congress, no court of the United States other than (the United States Supreme) Court could entertain a proceedings to reverse or modify the judgment for errors of that character. . . . To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original. At 415-16.

The doctrine of the *Rooker* case assumes continued validity. See, e.g., *Lavasek v. White*, 339 F.2d 861 (10th Cir. 1965); *Chance v. County Board of School Trustees*, 332 F.2d 971 (7th Cir. 1964).

It is apparent from the above-quoted portion of the *Rooker* decision that its doctrine is fully applicable to the case at bar. In both cases, the action was brought in the federal district court by aggrieved State court litigants to seek relief from an allegedly *void* State court judgment. In both cases, the State court admittedly had jurisdiction over the parties and the subject-matter of the litigation. In both cases, plaintiffs claimed that the alleged errors in the State courts' determination of constitutional questions rendered those judgments *void*. But it is clear from the language in *Rooker*, that such judgments rendered in the exercise of competent jurisdiction are at most erroneous; they are not void, are not subject to collateral attack, and are not open to relitigation in the federal district courts.

In view of the foregoing, it is not necessary to rule on the various other grounds urged in the motions under consideration herein. However, one word might be said with regard to the nature of plaintiffs' complaint which was objected to on the grounds that it failed to comply with Fed. R. Civ. Proc. 8(a). This rule requires a complaint to state "a short and plain statement of the claim showing that the pleader is entitled to relief." Plaintiffs' original complaint consists of ninety-four pages, attached to which are sixty-three exhibits and a subsequently filed amended complaint imposes an additional ten pages thereto. The court agrees that the dismissal of the complaint, as amended, would be proper, as was done in the similar case of *Corcoran v. Yorty* 347 F.2d 222 (9th Cir. 1965), for the reason that the complaint is "so verbose, confused and redundant that its true substance, if any, is well disguised." At 223. However, in the interests of an expeditious determination of this action, and in view of plaintiffs counsel's statements on the record, referred to above, as to the true nature of his claim the court has undertaken herein to decide the matter on the merits.

For the foregoing reasons, it is hereby ORDERED that defendants' motions to dismiss and for summary judgment are GRANTED and that plaintiffs' cause of action be dismissed with prejudice.

/s/ Thaddeus M. Machrowicz,
U.S. District Judge.

Dated at Detroit, Michigan,
this 22nd day of December, 1966.

APPENDIX "A"

EXCERPTS OF PROCEEDINGS HAD ON DECEMBER 12, 1966

Excerpts of proceedings had in the Motion to Dismiss in the above-entitled matter taken before the Honorable Thaddeus M. Machrowicz, District Court Judge, at Detroit, Michigan on Monday, December 12, 1966.

Appearances: Mr. August F. Brandt, appearing on behalf of the plaintiffs; Mr. Arthur M. Lang, appearing on behalf of defendant Lewis; Mr. Albert Sugar, appearing on behalf of defendant Belk; Mr. William Cooney, appearing on behalf of defendant Beattie; Mr. John R. Starrs, appearing in pro per; Mr. C. A. Tsangadas, appearing in pro per; (2) Mr. Sydney List, appearing in pro per; Mr. Ralph McKenney, appearing in pro per; Mr. James M. Wienner, appearing on behalf of the Estate of Wienner; Mr. William R. Rudell, appearing on behalf of the Attorney General.

* * * * *

The Court: I am primarily interested in knowing why this Court has jurisdiction over this matter. What new issues are there that brings this matter now within the jurisdiction of this Court?

Mr. Brandt: I am satisfied—

The Court: Why wasn't something done sooner?

Mr. Brandt: They have been active on this—this thing has been on the griddle continuously for the last fourteen years.

The Court: I mean since the Supreme Court action.

Mr. Brandt: There has been a contest going on right up to the last of—just here about a month ago. I think the last Court of Appeals denied the re-hearing just a little over a month ago.

But the reason we are here, and that is the (3) original jurisdiction of this Court, and there is no question—

The Court: What is the original jurisdiction of this Court, tell me?

Mr. Brandt: Well, the original jurisdiction of this Court is going to come in this way: We don't deny that the State Court had jurisdiction of the subject matter. We don't deny that the State Court had jurisdiction of the parties. But we do say that the original jurisdiction of this Court is being invoked because the State Court had no power to enter an order or judgment or a dictative which under the law of the State of Michigan they could not make.

• • • • •

United States District Court,
Eastern Division of Michigan—ss.

I, Walter R. Lauckner, one of the Official Court Reporters for the above court, do hereby certify that I recorded stenographically the testimony taken and proceedings had in the above-entitled and numbered cause before the Honorable Thaddeus M. Machrowicz, District Court Judge, at Detroit, Michigan, on December 12, 1966; and that the foregoing and annexed three typewritten pages

constitute a complete and accurate transcript of that portion of the proceedings herein transcribed.

Walter R. Lauckner,
Official Court Reporter,
739 Federal Building,
Detroit, Michigan 48226.

Dated: Dec. 22/66

APPENDIX B

DECREE OF MICHIGAN SUPREME COURT

(#41 April Term 1959)

Sidney M. Harvey, et al., Plaintiffs and Appellees, v. Daniel Lewis, et al., Defendants and Appellees, John R. Starrs, Receiver and Appellee, Ralph W. McKenney, Guardian Ad Litem, Appellant.	Supreme Court No. 48,011 (#41 April Term 1959) Li.14110 pa. 608

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 8th day of December, in the year of our Lord one thousand nine hundred and fifty~~-one~~ nine.

Present the Honorable John R. Dethmers, Chief Justice, Leland W. Carr, Harry F. Kelly, Talbot Smith, Eugene F. Black, George Edwards, John D. Voelker, Associate Justices.

This cause having been brought to this Court by appeal from the Circuit Court for the County of Wayne, in Chancery, and having been argued by counsel, and due deliberation having been had thereon; it appearing that the Circuit Court for the County of Wayne, in Chancery, on June 27, 1958, appointed John R. Starrs Receiver of the assets of Brookdale Cemetery Association, a Michigan rural cemetery association, and of Brookdale, Inc., a Michigan corporation, and of certain real estate in the County of Wayne, State of Michigan, description of which is hereinafter referenced; the said Receiver on September 24, 1958 petitioned the said Circuit Court for a Decree of Sale; in connection with said Petition the Circuit Court appointed a Guardian Ad Litem, Ralph W. McKenney, to represent persons who might be interested in the proposed Decree of Sale and who might for any reason be incapable of representing themselves; the said Guardian Ad Litem interposed objections to the proposed Petition for Decree of Sale; the plaintiffs also interposed objections to the Petition for Decree of Sale; the said Petition and Objections thereto came on to be heard on due notice; on October 7, 1958 a Final Decree of Sale was entered in said Circuit Court wherein was described with particularity the land authorized to be sold; the Guardian Ad Litem took general appeal from the Final Decree of Sale; the plaintiffs participated in said appeal as appellants; on Order of this Court the entire proceedings on file in the Circuit Court and the entire transcript of testimony had at the trial of this cause, April-July 1955, were brought up for consideration;

On October 12, 1959, this Court filed its Opinion, to which reference may be had;

On motion of Stanley E. Beattie, attorney for John R. Starrs, Receiver,

It is now Ordered, Adjudged and Decreed by this Court:

A.

That the Final Decree of Sale entered by the Trial Court on October 7, 1958 be, and the same is, hereby modified to provide that existing graves shall not be disturbed, and in all other provisions the said Decree is affirmed;

B.

That the legal title to the land in question is in Brookdale Cemetery Association, a Michigan rual cemetery association, organized under and existing by virtue of C.L. '48 456.101 et seq. (Stat. Ann. 21.871 et seq.), as against any claims of plaintiffs;

C.

That the land in question is subject to the jurisdiction of the Circuit Court for the County of Wayne in the Receivership proceedings therein;

D.

That plaintiffs have no interest of any kind or description in said land as an asset of said Brookdale Cemetery Association, and that the rights of plaintiffs are limited to such as may be possessed by them as stockholders in said Brookdale Inc.;

E.

That the claims of the plaintiffs to ownership of the referenced lands by virtue of constructive trust arising from asserted fraud and conspiracy alleged to have been practiced on plaintiffs, are herewith dismissed for the reasons that the plaintiffs have failed to show any conspiracy

or any fraud as charged, and that in the inception of the plan involving the formation of the syndicate, the acquiring of the property, the formation of a corporation or of corporations, and the conducting of a rural cemetery by Brookdale Cemetery Association, the parties concerned had acted in good faith without any attempt to defraud or deceive the plaintiffs;

F.

That the appellant Guardian Ad Litem and the appellee Receiver and his counsel shall be allowed their proper fees and disbursements to be paid as an expense of the receivership estate of said Brookdale Cemetery Association on proceedings duly noticed in the Trial Court, but that no other costs herein shall be allowed or taxed.

.....

Justice of the Supreme Court.

/s/ Approved
Leland W. Carr

State of Michigan—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the decree entered December 8, 1959 in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court, at Lansing, this 8th day of December, A.D. 1959.

/s/ Donald F. Winters,
Clerk.

(Seal)

APPENDIX C

PLAINTIFFS' PETITION TO VACATE SUPREME COURT OPINION DATED OCTOBER 12th, 1959 (357 MICH. 305) AND DECREE DATED DECEMBER 8th, 1959 FOR WANT OF JURISDICTION

(Excerpts from)

Sidney M. Harvey, et al.,
Plaintiffs-Petitioners,
v.
Charlotte L. Kline, et al.,
Defendants-Respondents,
and
John R. Starrs, "Receiver" et al.,
Claimants-Respondents.

This Petition Relates to No. 48,011

* * * * *

8. * * * by proceedings hereinabove specified and referred to plaintiffs have been and are deprived of the equal protection of the Laws and of due process of law in violation of constitutional provisions as follows:

* * * * * *

APPENDIX D

ORDER DENYING MOTION TO VACATE

(Calendar No. 48,011)

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 28th day of June in the year of our Lord one thousand nine hundred and sixty-one.

Present the Honorable John R. Dethmers, Chief Justice, Leland W. Carr, Harry F. Kelly, Talbot Smith, George Edwards, Thomas M. Kavanagh, Theodore Souris, Associate Justices.

In this cause a motion is filed by plaintiffs to vacate the decree heretofore entered herein on October 12, 1959 and for other relief, and answers thereto having been filed by defendants, and due consideration thereof having been had by the Court, it is ordered that the motion be and the same is hereby denied.

State of Michigan—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan; do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 30th day of June in the year of our Lord one thousand nine hundred and sixty-one.

Donald F. Winters,
Clerk.

TABLE OF CONTENTS

	Page
Brief—Objections to Plaintiffs' Petition for Writ of Certiorari	2-10
Appendix A—Order Directing Clerk to Enter Summary Judgments Forthwith But Nunc Pro Tunc as of December 22, 1966 (Civil Action No. 29,165)	11-12
Appendix B—Proof of Service (Civil Action No. 29,165)	13-14
Appendix C—Docket Entries (Civil Action No. 29,165)	14-18

INDEX TO AUTHORITIES CITED

Harvey, et al. v. Lewis et al., 357 Mich. 305, 98 N.W. 29,165	15-16
Harvey, et al. v. Lewis, et al., 365 Mich. 159, 112 N.W. 2d 73	6
Harvey v. Lewis, 363 Mich. 232, at 235 (1961), 109 N.W. 2d 143	6
F.R.C.P. 8(a)	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. .....

EMMA R. MOIST, individually and as assignee of Sidney M. Harvey and William T. McAlonan; LOUISE C. KUSHIGIAN, Administratrix of the Estate of Thermie K. Henkle, deceased; GEORGIANA S. WHITMAN, survivor of herself and Henry R. Whitman, deceased, and EVELYN M. SANDERS, Special Administratrix of the Estate of Muriel Miller, deceased,

Petitioners,

versus

BERNARD BELK, individually and as alleged "Receiver" of Brookdale Cemetery Association and Brookdale, Inc., alleged Michigan corporations, GEORGE LEWIS, individually and as survivor of himself and Daniel Lewis and Saul Lewis, both deceased, formerly co-partners doing business as Lewis Brothers and as Lewis Bros., Inc., Lewis Brothers Memorial Chapel, Daniel Lewis & Brothers, Lewis Bros. Funeral Directors, Inc., and Mt. Sinai Memorial Cemetery Association, CHARLOTTE L. KLINE, Administratrix of the Estate of Saul Lewis, deceased, NAOMI V. HILSEN and RICHARD E. MANNING, successor administrators, duly appointed of the Estate of Daniel Lewis, deceased, BROOKDALE CEMETERY ASSOCIATION, an alleged Michigan Rural Cemetery Association, BROOKDALE, INCORPORATED, an alleged Michigan Profit corporation, CONSTANTINE A. TSANGADAS, JOHN R. STARRS, STANLEY E. BEATTIE, RALPH W. McKENNEY, SYDNEY LIST, DAPHNE LIST, JAMES M. WIENNER, Administrator of the Estate of Harris W. Wienner, deceased, and DEPARTMENT OF COMMERCE, formerly Corporation and Securities Commission, of the State of Michigan,

Respondents.

To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Ralph W. McKenney, Guardian ad Litem, and one of the Respondents in the above entitled cause, respectfully objects to the Plaintiffs' Petition for Writ of Certiorari for the following reasons:

1. Leaving aside the personal abuse in the case for the moment, the core question is whether the Supreme Court of Michigan passed on the legal title to the cemetery here involved. The Plaintiffs' position is that the Michigan Supreme Court had no jurisdiction for certain technical reasons, despite its opinion in *Harvey, et al. v. Lewis et al.*, 357 Mich. 305, 98 N.W. 2d 599, and any decree of the Michigan Court would be void and therefore not binding, despite the fact that the land is admittedly in Michigan, and all parties in interest are Michigan residents, and there was personal service and jurisdiction. Plaintiffs filed in the Michigan Supreme Court a "Petition to Vacate Supreme Court Opinion Dated October 12th, 1959 (357 Mich. 305) and Decree Dated December 8th, 1959, for Want of Jurisdiction." This Petition To Vacate was denied on November 24th, 1959 as appears in the preamble to the Michigan Supreme Court decision. All of Plaintiffs' contentions were overruled in this case, and admittedly certiorari was never taken therefrom. Plaintiffs' position is that they can now commence the case *ab initio* again in the Federal District Court at Detroit. The rule requires printing of all opinions below in the Petition for Certiorari, (which was not done in this case as the Federal District

Court opinion is omitted). However, to show this Honorable Court, the awareness of these plaintiffs that the proper remedy was certiorari, from the decision of the Michigan Supreme Court, the following, from the opinion of the Federal District Court is printed. At pages 2-4 of the District Court's opinion, the following appears:

> "Plaintiffs' counsel also conceded certain other matters on the record at the December 12 hearing. He stated that his clients had been represented by counsel of their choice during the entire State court proceedings and that they did fail to seek review of the allegedly void 1959 Michigan Supreme Court decision by application to the United States Supreme Court. This failure to seek such review was knowing and deliberate on the part of plaintiffs inasmuch as they were aware then of the same Constitutional issues which they are raising herein, and were advised by their present counsel to seek such ultimate review of the alleged violation of their constitutional rights which they are challenging herein.[2] Furthermore, plaintiffs' counsel also stated that each and every issue which plaintiffs are raising herein was formally raised in the State Court proceedings or could have been raised therein if plaintiffs' counsel had wished to do so.[3]
>
> These facts and circumstances describe the classic situation for the application of the doctrine of *res judicata*. Perhaps the most compelling reason for the use of this doctrine is to bring an eventual end to litigation, so that in the orderly course of judicial administration, issues once litigated and controversies once resolved may not be subsequently reopened. It appears to the court that this is precisely what plaintiffs are attempting to do in this cause, to relitigate claims which have already been decided by the State courts of competent jurisdiction adversely to plaintiffs. Whether, as plaintiffs claim, the 1959 Michigan Supreme Court decision denied them equal protection of the law by incorrectly applying State law is not before the court

at this time. If such decision violated plaintiffs' constitutional rights their only relief would have been to seek direct review in the United States Supreme Court. This procedure they deliberately waived. They cannot now be heard anew on this same claim in federal district court. As the court pointed out in *Rhodes v. Meyer,* 334 F. 2d 709 (8th Cir. 1964), cert. denied 379 U. S. 915 (1964), the Civil Rights Act was not intended to allow persons knowledgeable in legal procedures to ignore an opportunity to correct an alleged error and then, in subsequent proceedings, attack the administration of justice."

Footnotes 2 and 3 cited from the Federal District opinion are quoted below:

"2. Plaintiffs' present counsel informed the court on the record at the December 12 hearing that he had carefully followed and studied the State court proceedings as they progressed because of his great interest in the issues raised therein. Although he stated he had no formal connection with the case at the time of the 1959 Michigan Supreme Court decision, he nevertheless was of the opinion that the decision was unconstitutional and he urged counsel representing plaintiffs at that time to appeal the decision to the United States Supreme Court. Plaintiffs' failure to heed such advice is unexplained on this record, but it is clear that their counsel had been so advised and could have sought such review if he had considered it in his clients' best interests.

3. Plaintifffs' petition for rehearing, formally entitled 'motion to vacate', filed in the Michigan Supreme Court subsequent to its 1959 decision, raised the constitutional issues of denial of due process and equal protection."

In the course of the argument before the District Court, Plaintiffs asserted this matter had only been appealed twenty-two (22) times instead of thirty-nine (39) times as the Defendants claimed, but in any case, it would seem to have been extremely well litigated, and that Plaintiffs have more than had their "day in court".

2. While it is submitted that matter is fully covered by the doctrine of *res judicata*, the District Judge agreed with Defendants that for other reasons, the case should have been dismissed, saying at page 5 of the District Court opinion that counsel failed to comply with Fed. R. Civ. Proc. 8(a).

> "In view of the foregoing, it is not necessary to rule on the various other grounds urged in the motions under consideration herein. However, one word might be said with regard to the nature of plaintiffs' complaint which was objected to on the grounds that it failed to comply with Fed. R. Civ. Proc. 8(a). This rule requires a complaint to state 'a short and plain statement of the claim showing that pleader is entitled to relief.' Plaintiff's original complaint consists of ninety-four pages, atttached to which are sixty-three exhibits and a subsequently filed amended complaint imposes an additional ten pages thereto. The court agrees that the dismissal of the complaint, as amended, would be proper, as was done in the similar case of *Corcoran v. Yorty*, 347 F. 2d 222 (9th Cir. 1965), for the reason that the complaint is 'so verbose, confused and redundant that its true substance, if any, is well disguised.' At 223. However, in the interests of an expeditious determination of this action, and in view of plaintiffs' counsel's statements on the record, referred to above, as to the true nature of his claim the court has undertaken herein to decide the matter on the merits."

3. In a case of this character, replete with personal abuse, vituperation, and insults to the Michigan judiciary, it is respectfully submitted that it is not a case deserving of the time and attention of the highest Court of the land.

4. As to this particular defendant, the guardian ad litem, his pleadings included special defenses not available to all of the Defendants.

The Michigan Supreme Court in litigation directly between these plaintiffs, and Ralph W. McKenney, this guardian ad litem, passed on the guardian ad litem's fees, in *Harvey, et al. v. Lewis, et al.,* Claim of McKenney, Guardian, 365 Mich. 159, 112 N.W. 2d 73. In that particular case, all manner of charges of fraud and conspiracy were levelled against this guardian ad litem and rejected by the Supreme Court unanimously. One of the Judges concurring specially in the result listed as of that time (1961) twenty-one (21) appeals and there have been others since that date. Also see the related case of *Harvey v. Lewis,* 363 Mich. 232, at 235 (1961), 109 N.W. 2d 143, wherein the Michigan Court said:

> "PER CURIAM. On motion of the Court, the briefs and appendices of plaintiffs-appellants Harvey et al., in the above-styled matters are stricken for gross violations of Court Rule No. 67 (particularly sections 1, 2 and 7 thereof).
>
> Further, under authority of Court Rule No. 70, §5(b), the appeals of plaintiffs-appellants Harvey, et al., will be dismissed 60 days from date unless by then appellants have filed briefs and appendices complying with appellate rules."

In the motion before the Federal District Court at Detroit for Summary Judgment in behalf of this guardian ad litem, a lengthy printed brief in the Michigan Supreme Court alleging all manner of evil doing by this guardian ad litem was attached, showing all of these relevant litigated matters. Without reprinting the whole of Plaintiffs'

brief, the following from it, which are the only "Statement of Questions Involved" is reproduced here to show that these matters, too, were litigated in the Michigan Supreme Court.

> "1. Do prejudice, partiality, 'adversary' and unauthorized activities of an attorney who accepted an appointment as 'guardian ad litem' both disqualify him and defeat his right to compensation for alleged services?
>
> The Successor Judge answered, 'No.'
> Plaintiffs-Appellants insist the answer should be, 'Yes.'
>
> 2. Does the fact that an attorney who was appointed 'guardian ad litem,' who in ignorance of the contents of the file joined in Successor Trial Court reversal and dismemberment of the Trial Judge's Opinion without retrying or taking testimony on the heart and core thereof and who failed to perform the normal duties of a 'guardian ad litem', but without authority indulged in activities adverse to parties to the suit, defeat or affect the amount to be allowed to said attorney on his claim for services?
>
> The Successor Judge answered, 'No'.
> Plaintiffs-Appellants insist the answer should be, 'Yes'.
>
> 3. Does misrepresentation of the purpose of the appointment of an attorney as 'guardian ad litem' and of his purpose acting under such appointment affect both the validity of said appointment and defeat or affect the amount to be allowed to said attorney on his claim for services as such?
>
> The Successor Judge answered, 'No'.
> Plaintiffs-Appellants insist the answer should be, 'Yes'.

4. Does the insertion in an Appendix of a wholly irrelevant contingent agreement under the false claim that it was a 70% fee agreement when it was on its face less than 45%, without showing or giving notice that there was a Final Decree establishing its propriety and validity, defeat or affect the amount to be allowed to an attorney acting adversarily under an appointment as 'guardian ad litem' for his services?

The Successor Judge answered, 'No'.
Plaintiffs-Appellants insist the answer should be, 'Yes'."

5. A Motion to Dismiss Appeal in the Circuit Court for the Sixth Circuit was filed by this respondent, pointing out, among other things, that in addition to the Judgment of the District Court applying to each and every defendant, that as to Ralph W. McKenney, Constantine A. Tsangadas, and John R. Starrs, a Summary Judgment had been ordered by the District Court on December 22, 1966, in their favor, which was cumulative to the regular judgment applying to all defendants. By Order dated February 10 1967, the Federal District Judge ordered the clerk to enter separate Summary Judgments in favor of these named defendants Nunc Pro Tunc as of December 22, 1966. A true copy of this Order is attached marked Appendix A. This Order was attached to this respondent's Motion to Dismiss Appeal in the Sixth Circuit Court of Appeals, marked in that Motion as Exhibit 6. A copy of the Proof of Service of the Petition for Order Directing Clerk to Enter a Summary Judgment and Proof of Service of the Order directing Clerk (Federal Court) to enter a Summary Judgment forthwith but Nunc Pro Tunc is attached hereto, being marked Appendix B and was Exhibit 7 in the aforesaid Motion to Dismiss Appeal in the Circuit Court for the Sixth Circuit.

A copy of the Calendar Entries is attached hereto, being marked Appendix C, and was marked Exhibit 8 in the aforesaid Motion to Dismiss Appeal in the Circuit Court of Appeals.

6. No appeal from the Trial Court's "Order Directing Clerk to Enter Summary Judgments Forthwith but Nunc Pro Tunc, as of December 22, 1966" dated February 10 1967, was ever taken, and the time to appeal has long since expired.

7. The Petition for Writ of Certiorari, at page 12, clearly shows the appeal is only from the December 22, 1966 judgment or order on the respondents' motions to dismiss, and has nothing to do with appealing from the granting of the summary judgment. Petitioners statement is as follows:

> "On December 22, 1966 the District Court granted the motion of defendants to dismiss the complaint filed herein before answer and trial (R. 242a-253a) and plaintiffs subsequently perfected an appeal from the orders."

Therefore, this Petition for Certiorari is not timely and the Summary Judgments stand unchallenged and are grounds, in addition to the other reasons for dismissal of the Petition for Certiorari.

In the body of the Plaintiffs' brief in that case, (the complete brief of which was included in the Motion for Summary Judgment in the Federal District Court), extremely defamatory material was alleged and falseness of it rebutted in this guardian ad litem's brief filed in the case determined in the Michigan Supreme Court, as to the guardian ad litem's fees. All of this was passed on by the

Michigan Supreme Court, which by its holding in the guardian ad litem fee case, 365 Mich. 159, 112 N.W. 2d 173, denied plaintiffs' unfounded, untrue and scandalous claims. Plaintiff's brief was replete with allegations of conspiracy by the guardian ad litem, partiality, and fraud, (none of which was true), but which is here referred to in order to show the full measure of *res judicata*.

WHEREFORE, it is respectfully prayed that Plaintiffs' Petition for Writ of Certiorari be denied.

Respectfully submitted,

.....

RALPH W. McKENNEY,
Guardian Ad Litem,
In Propria Persona,
2526 Buhl Building,
Detroit, Michigan 48226.

Dated: September 27, 1967.

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Emma R. Moist, etc. et al., Plaintiffs, v. Bernard Belk, etc., George Lewis, etc., Charlotte L. Kline, etc., Naomi V. Hilsen and Richard E. Manning, etc., Brookdale Cemetery Association, etc., Brookdale, Inc., etc., Constantine A. Tsangadas, John R. Starrs, Stanley E. Beattie, Ralph W. McKenney, Sydney List, Daphne List, James M. Wienner, etc. and Department of Commerce of the State of Michigan, Defendants.	Civil Action 29,165

ORDER DIRECTING CLERK TO ENTER SUMMARY JUDGMENTS FORTHWITH BUT NUNC PRO TUNC AS OF DECEMBER 22, 1966

At a session of said Court held in the Federal Building, Detroit, Michigan on February 10, 1967.

Present: Honorable Thaddeus M. Machrowicz, District Judge.

On reading and filing the petition of Constantine A. Tsangadas, John R. Starrs and Ralph W. McKenney for entry of summary judgments in their favor in this cause, as ordered by this Court on December 22, 1966, and it appearing that the clerk has not heretofore entered such judgments under Rule 58, as amended,

It is hereby ordered that, pursuant to Rule 58 as amended, the Clerk of this Court forthwith, but nunc pro tunc as of December 22, 1966, enter separate summary judgments in favor of each of the petitioners, Constantine A. Tsandas, John R. Starrs and Ralph W. McKenney, and against plaintiffs.

Thaddeus M. Machrowicz,
District Judge.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Emma R. Moist, et al.,
Plaintiffs,

v.

Bernard Belk, etc., George Lewis, etc., Charlotte L. Kline, etc., Naomi V. Hilsen and Richard E. Manning, etc., Brookdale Cemetery Association, etc., Brookdale, Inc., etc., Constantine A. Tsangadas, John R. Starrs, Stanley E. Beattie, Ralph W. McKenney, Sydney List, Daphne List, James M. Wienner, etc. and Department of Commerce of the State of Michigan,
Defendants.

Civil Action
29,165

PROOF OF SERVICE

State of Michigan,
County of Wayne—ss.

C. A. Tsangadas, being first duly sworn, deposes and says that on the 11th day of February, 1967 he served a copy of the Petition for Order directing Clerk to enter Judgment pursuant to Rule 58, Nunc Pro Tunc as of December 22, 1966, and a copy of the Order directing Clerk to enter a Summary Judgment forthwith but Nunc Pro Tunc as of December 22, 1966, on August F. Brandt, Attorney for Plaintiffs, 383 St. Clair Avenue, Grosse Pointe,

Michigan; on Albert Sugar, Attorney for Belk, 950 Guardian Building, Detroit 26, Michigan; on Arthur Lang, Attorney for Lewis, 1725 First National Building, Detroit, Michigan; William Rudell, for Attorney General, 1900 Cadillac Square Building, Detroit 26, Michigan; on James M. Wienner, 3110 Guardian Building, Detroit 26, Michigan; on Sydney List, 10345 Freeland Avenue, Detroit 35, Michigan, by depositing the same in the United States Mail with postage fully prepaid, and on Wm. Cooney, Union Guardian Building, Detroit Michigan.

And further deponent saith not.

C. A. Tsangadas.

Subscribed and sworn to before me, this 11th day of February, A.D., 1967.

/s/ John C. Coots,

Notary Public, Wayne County, Michigan.
My commission expires March 30, 1969.

APPENDIX C

(Civil Action 29,165)

DOCKET ENTRIES

1966

Nov. 9. Complaint with attached exhibits, filed—summons issued.

Nov. 9. Motion for preliminary injunction with supporting briefs, filed, hearing Nov. 21, 1966.

Nov. 14. Motion of Estate of Daniel Lewis, deceased, Jean K. Lewis and George Lewis to dismiss with exhibit, filed, hearing Nov. 21, 1966.

Nov. 14. Motion and temporary restraining order, filed and entered; Machrowicz, J.

Nov. 18. Answer to motion for preliminary injunction and temporary restraining order, filed.

Nov. 18. Motion to dismiss, filed, hearing Nov. 21, 1966.

Nov. 18. Summons filed.

Nov. 18. Motion for preliminary injunction and motion to dismiss heard and adj. to Nov. 28, 1966.

Nov. 21. Marshal's return of summons, etc., filed.

Nov. 21. Proof of service, filed.

Nov. 21. Plaintiffs' response and brief in opposition to motion to dismiss by defendants George Lewis and estates of Daniel Lewis and Saul Lewis, both deceased, filed.

Nov. 22. Notice of amended complaint, filed.

Nov. 23. Proof of service, filed.

Nov. 23. Proof of service, filed.

Nov. 25. Marshal's return of order and motion, filed.

Nov. 28. Motion for preliminary injunction adj. to Nov. 29, 1966, Machrowicz, J.

Nov. 29. Affidavit of Edward M. Babcock, filed.

Nov. 29. Order dissolving temporary restraining order and denying motion for preliminary injunction, filed, Machrowicz, J.

Nov. 30. Summons filed.

Nov. 30. Motion of Stanley E. Beattie to dismiss with supporting affidavit, brief and proof of service, filed, hearing Dec. 12, 1966.

Dec. 1. Motion of defendant Starrs to dismiss and motion for summary judgment with supporting brief, exhibits and proof of service, filed, hearing Dec. 12, 1966.

Dec. 2. Motion of Constantine A. Tsangadas to dismiss and summary judgment with supporting memorandum and proof of service, filed, hearing Dec. 12, 1966.

Dec. 2. Motion of Sydney and Daphne List to dismiss with supporting brief, filed, hearing Dec. 12, 1966.

Dec. 2. Motion of Ralph W. McKenney to dismiss with supporting brief and proof of service, filed.

Dec. 5. Motion of James M. Weinner to dismiss, filed, hearing Dec. 12, 1966.

Dec. 6. Proof of service, filed.

Dec. 12. Motions to dismiss heard and taken under advisement.

Dec. 15. Appearance of Department of Commerce, formerly Corporation & Securities Commission, filed.

Dec. 22. Transcript of Dec. 12, 1966, filed.

Dec. 22. Memorandum opinion and order granting motions to dismiss and motions for summary judgment with prejudice, filed and entered, Machrowicz, J.

Dec. 23. Order granting motion to dismiss cause as to the Estate of Daniel Lewis, deceased, Jean K. Lewis, and George Lewis, defendants, with prejudice, filed and entered, Machrowicz, J.

Dec. 23. Proof of mailing, filed.

Dec. 27. Notice of entry mailed.

1967

Jan. 3. Order dismissing cause and discharging lis pendens as to Bernard Belk, individually and as Receiver for Brookdale Cemetery Association, with costs to be taxed in favor of Bernard Belk, filed and entered, Machrowicz, J.

Jan. 18. Plaintiffs' notice of appeal, filed.

Jan. 18. Plaintiffs' appeal bond in cash of $250.00—Receipt No. 43394.

Jan. 23. Motion and order extending time to file and docket record on appeal to Apr. 18, 1967, filed and entered, Machrowicz, J.

Jan. 23. Letter to attorneys re: appeal, filed.

Jan. 23. Proof of mailing filed.

Jan. 23. Proof of service, filed.

Feb. 7. Motion of Estate of Daniel L. Lewis, deceased, Jean K. Lewis and George Lewis for security for costs and proof of service, filed, hearing Feb. 13, 1967.

Feb. 7. Motion of Stanley E. Beattie for security for costs with proof of service filed, hearing Feb. 13, 1967.

Feb. 9. Petition for order directing Clerk to enter judgment pursuant to rule 58, nunc pro tunc as of Dec. 22, 1966, filed.

Feb. 10. Order directing Clerk to enter summary judgments forthwith but nunc pro tunc as of Dec. 22, 1966, filed and entered, Machrowicz, J.

Feb. 10. Clerk's judgment on decision by the Court as to defendants John R. Starrs, Ralph W. McKenney and Constantine A. Tsangadas that plaintiffs take nothing and that said defendants recover costs—entered nunc pro tunc as of Dec. 22, 1966, filed.

Feb. 13. Proof of service, filed.

Feb. 13. Motion for security for costs with affidavit of service, filed, hearing March 6, 1967.

Mar. 6. Motion for security for costs heard and granted —plaintiffs to file $1,000.00 for each defendant a total of $9,000.00—order to be entered, Machrowicz, J.

Mar. 9. Order for security for costs, filed and entered, Machrowicz, J.

Mar. 13. Proof of service of order for security for costs, filed.

Mar. 15. Motion of Bernard Belk for security for costs and for supersedeas bond with supporting brief and proof of service, filed, hearing Mar. 20, 1967.

Mar. 16. Response to motion of defendant Bernard Belk for security for costs for supersedeas bond and supporting brief, filed.

Mar. 20. Motion for security for costs, etc., adj. to Mar. 27, 1967, Machrowicz, J.

Mar. 21. Notice of filing security for costs, filed.

Mar. 21. Security bond for costs in $9,000.00, filed, Fidelity and Deposit Co. of Maryland, surety.

Mar. 27. Motion for security for costs and for supersedeas bond by defendant Bernard Belk heard and denied, Machrowicz, J.

Mar. 31. Opinion re: receiver's motion for security for costs and supersedeas bond, filed and entered, Machrowicz, J.

Mar. 31. Order denying receiver's motion for security for costs and for supersedeas bond, filed and entered, Machrowicz, J.

Mar. 31. Proof of mailing, filed.

Apr. 10. Order of CCA re: oral argument at Cincinnati, Ohio, Apr. 19, 1967 and as to briefs, filed.

Apr. 19. Acknowledgment filed.

LIBRARY
SUPREME COURT, U. S.

FILED
OCT 13 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 609

EMMA R. MOIST, etc., et al.,
Petitioners,

v.

BERNARD BELK, etc., et al.,
Respondents.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

A. ALBERT SUGAR,
Attorney for Respondent, Bernard Belk,
950 Guardian Building,
Detroit, Michigan 48226,

ARTHUR M. LANG,
Attorney for Respondents, Lewis,
1725 First National Building,
Detroit, Michigan 48226.

Interstate Brief & Record Co., 356 E. Congress St., Detroit, Michigan 48226
WO. 2-8745—WO. 2-8732

SUBJECT INDEX

	Page
I. Opinion Below	2
II. Jurisdictional Statement	2
III. Question Presented for Review	2
IV. Constitutional Provision and Statutes Involved	3
V. Statement	3-4
VI. Reasons for Denying Writ	4-6
Conclusion	7
Appendix B-1—Memorandum Opinion and Order Granting Motions to Dismiss and Motions for Summary Judgment	9-15
Appendix B-2—(Being Appendix "A" to Opinion of District Court)	15-17

INDEX OF AUTHORITIES

Cases

	Page
Crawford v. Zeitler (C.A. Ohio, 1964) 326 F.2d 119	5
Davis Trust Company v. Hardee, 66 App. D.C. 168; 85 F.2nd 571	6
Freedman v. Parklane Motors, Inc., 238 N.Y.S. 2nd 973, 976; 18A 2nd 262	4
Harvey v. Lewis, 357 Mich. 305, 98 N.W. 2nd 599	3
United States Fidelity and Guarantee Company v. McCarthy, 33 F.2d 7	4

Statutes

42 U.S.C.A. Sec. 1983	5
Sec. 1254 of Title 28 of the United States Code	2
Mich. CL '48 Par. 600.5805; M.S.A. 27A.5805	5

Texts

45 Am. Jur., Receivers Par. 385	6
30A, Amer. Jur., Judgments Sec. 844	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. .....

EMMA R. MOIST, individually and as assignee of Sidney M. Harvey and William T. McAlonan; LOUISE C. KUSHIGIAN, Administratrix of the Estate of Thermie K. Henkle, deceased; GEORGIANA S. WHITMAN, survivor of herself and Henry R. Whitman, deceased, and EVELYN M. SANDERS, Special Administratrix of the Estate of Muriel Miller, deceased,

Petitioners,

versus

BERNARD BELK, individually and as alleged "Receiver" of Brookdale Cemetery Association and Brpokdale, Inc., alleged Michigan corporations, GEORGE LEWIS, individually and as survivor of himself and Daniel Lewis and Saul Lewis, both deceased, formerly co-partners doing business as Lewis Brothers and as Lewis Bros., Inc., Lewis Brothers Memorial Chapel, Daniel Lewis & Brothers, Lewis Bros. Funeral Directors, Inc., and Mt. Sinai Memorial Cemetery Association, CHARLOTTE L. KLINE, Administratrix of the Estate of Saul Lewis, deceased, NAOMI V. HILSEN and RICHARD E. MANNING, successor administrators, duly appointed of the Estate of Daniel Lewis, deceased, BROOKDALE CEMETERY ASSOCIATION, an alleged Michigan Rural Cemetery Association, BROOKDALE, INCORPORATED, an alleged Michigan Profit corporation, CONSTANTINE A. TSANGADAS, JOHN R. STARRS, STANLEY E. BEATTIE, RALPH W. McKENNEY, SYDNEY LIST, DAPHNE LIST, JAMES M. WIENNER, Administrator of the Estate of Harris W. Wienner, deceased, and DEPARTMENT OF COMMERCE, formerly Corporation and Securities Commission, of the State of Michigan,

Respondents.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TO: The Honorable Earl Warren, Chief Justice of the Supreme Court of the United States, and the Associate Justices of the Supreme Court of the United States:

The Respondent, Bernard Belk, individually and as Receiver of Brookdale Cemetery Association and Brookdale, Inc., a Michigan corporation and the other named respondents herein respectfully pray that this Honorable Court deny the Petition for Writ of Certiorari filed herein to review a judgment and opinion of the Court of Appeals for the Sixth Circuit rendered in this cause on June 17th, 1967.

Your Respondents respectfully show:

I.

OPINION BELOW

Respondents agree with the statement contained in section I of the Petition for Writ of Certiorari.

II.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Sixth Circuit was rendered in this cause on June 17, 1967 and this Court has jurisdiction to review the same under Section 1254 of Title 28 of the United States Code.

III.

QUESTION PRESENTED FOR REVIEW

Was the Sixth Circuit Court of Appeals correct in dismissing the appeal as being frivolous?

IV.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Respondents agree with Paragraph IV. A and B contained in the Petition for Certiorari, but deny that any of the Statutes cited in Paragraph IV C are applicable.

V.

STATEMENT

Contrary to the statement of the Petitioners that "the following facts have not been denied," the Respondents have denied the conclusions and facts stated therein since 1952 and further assert that all issues raised therein have been litigated and decided by the Michigan Courts, more particularly in *Harvey v. Lewis* (1959), 357 Mich. 305, 98 NW 2nd 599. That case held that title to the Brookdale Cemetery was in a corporate entity and not in the plaintiffs, the Court saying "the legal title to the land in question, and the ownership thereof as against any claims of the plaintiffs, to be in Brookdale Cemetery Association and subject to the jurisdiction of the Court in the receivership proceeding." 357 Mich. at 314. As reported in the opinion of the Sixth Circuit Court of Appeals (Appendix A-1), the Michigan Court further decreed "that plaintiffs have no interest of any kind or description in said land and as an asset of the corporation, and that the rights of plaintiffs are limited to such as may be possessed by them as stockholders in Brookdale, Inc., or Brookdale Cemetery Association." Ibid. at 314.

On January 6th, 1966 the Wayne County Circuit Court ordered the cemetery sold (Appendix A, Petition for Writ

of Certiorari, pg. 34). On August 25, 1966, the Court of Appeals of the State of Michigan affirmed the action of the Circuit Court in ordering the sale of the cemetery (Appendix B, Petition for Writ of Certiorari, pg. 37).

Petitioners herein did not appeal the decision of the Michigan Court of Appeals to the Michigan Supreme Court, but instead, filed their complaint in the United States District Court, the dismissal of which is the subject matter before the Supreme Court of the United States in this petition for Writ of Certiorari. See Appendix B for opinion of the District Court. (Page 9 herein.)

VI.

REASONS FOR DENYING WRIT

The issue in this case is whether the Court of Appeals for the Sixth Circuit acted correctly in dismissing the appeal as being frivolous. The various Michigan courts have had this case before them since 1952 during which time the Petitioners herein did not raise the issue of violations of constitutional rights. Such issues are therefore *Res Judicata*. The concept of *Res Judicata* includes subsequent litigation as to all matters actually litigated and in addition thereto, matters which might have been litigated. *Freedman v. Parklane Motors, Inc.*, 238 N.Y.S. 2nd 973, 976; 18 A. 2nd 262. The case cited by Petitioners, *United States Fidelity and Guarantee Company v. McCarthy*, 33 F. 2nd 7 has no application to this case since *McCarthy* related to a situation where the facts in the second case were different from those of the first. The question in the *McCarthy* case was whether total disability under an insurance policy had been proved by the insured. The policy holder brought suit covering one specific period and after prevailing in the first litigation, brought suit a second time

to cover a subsequent period of alleged total disability. The Court held that the first case was *Res Judicata* only as to the first period and the second case, since evidence of non-disability could be submitted, must proceed to trial.

In the instant case, no allegations of wrong doing are alleged after the final disposition of the order confirming sale.

Petitioners have claimed violations of their rights under 42 U.S.C.A. Sec. 1983, which violations allegedly began in 1952. Accordingly their claims are barred by the Statute of Limitations. Since the Federal Civil Rights Act, 42 U.S.C.A. Sec. 1983 contains no statute of limitations, the Court must look to the applicable state statute, see *Crawford v. Zeitler* (C.A. Ohio, 1964) 326 F. 2nd 119. In Michigan, the Statute of Limitations in tort actions is three (3) years, CL '48 §600.5805; MSA 27A.5805. Thus, even if the matter is not *Res Judicata,* it cannot be litigated fifteen (15) years later.

The Petitioners admit at page 17 of the Petition that the only issue submitted to the Michigan Supreme Court was the action of the trial court in authorizing the sale of assets of Brookdale Cemetery Association, but Petitioners persist in attempting to thwart the order of sale by raising frivolous constitutional issues, which, even if meritorious should not delay the sale of land inasmuch as Petitioners would have the right to recover damages out of the proceeds of said sale. It should be emphasized, that the Michigan Courts ordered a sale of the cemetery and the Petitioners have raised no meritorious claims which should prevent such a sale. The Petitioners are parties in the action pending in the Michigan Courts and may make appropriate claims against the receivership assets once the cemetery has been sold and the proceeds paid over to the receiver to be held by him for ultimate distribution. Any

orders of the Michigan Trial Court relating to the distribution of receivership assets may be appropriately challenged by the Petitioners herein in the case presently pending in the Michigan Courts. Respondents do not acknowledge that the Petitioners have any such claims, but the effect of the Federal Court action in this matter has been to delay the sale of the cemetery where such action was ordered by the Michigan Courts and no appeal to the Michigan Supreme Court taken therefrom. Therefore, the sale should not be prevented under any circumstances, the Petitioners being possessed of all rights to challenge distribution of the proceeds of said sale.

The records submitted by Petitioners will show that the Petitions filed by the defendant, Harris W. Wienner was not filed as a judgment creditor's proceeding, but rather, was a petition to have the cemetery sold pursuant to a previous Court order requiring such a sale. In any receivership proceeding, assets may be sold to satisfy debts owed to creditors of the receivership. *Davis Trust Co. v. Hardee,* 66 App. D.C. 168; 85 F. 2nd 571. See 45 Am. Jur., Reveivers, §385.

The aforesaid sale was, as stated above, ordered by the Michigan Courts and Petitioners elected not to appeal from such order. Thus the order confirming sale has the effect of a final judgment which may not be collaterally attacked in the Federal Courts. See 30A. Am. Jur., judgments, Sec. 844.

CONCLUSION

Wherefore, Respondents respectfully pray that this Court deny the Petition for Writ of Certiorari and grant such other relief as to this Court may seem proper.

Dated this — of September, 1967.

Respectfully submitted,

.....

A. ALBERT SUGAR,
Attorney for Respondent, Bernard Belk,
950 Guardian Building,
Detroit, Michigan 48226.

ARTHUR M. LANG,
Attorney for Respondents, Lewis,
Penobscot Building,
Detroit, Michigan 48226.

APPENDIX B-1

MEMORANDUM OPINION AND ORDER GRANTING MOTIONS TO DISMISS AND MOTIONS FOR SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Emma R. Moist, et al.,
Plaintiffs,
v.
Bernard Belk, et al.,
Defendants.

Civil Action
No. 29,165

Dated at Detroit, Michigan
this 22nd day of December, 1966.

This action was commenced on November 9, 1966, upon the filing of a complaint which named as defendants twelve individuals, two "alleged corporations" and the Michigan Department of Commerce. Each of the defendants named are alleged in the complaint to have participated at some time at present or in the past in the State court receivership proceedings involving certain real property. Defendants herein are charged with conspiracy to violate and with substantive violations of plaintiffs' Constitutional rights to due process and equal protection as guaranteed by the Fourteenth Amendment. Motions to dismiss were filed on behalf of all defendants and alternative motions for summary judgment were filed on behalf of some of the defendants.

The motions came on for full hearing on December 12, 1966, at which the following uncontested matters were brought to the court's attention. The original petition for receivership was filed by plaintiffs herein or their predecessors in interest (hereinafter referred to as "plaintiffs") in the Wayne County Circuit Court on November 22, 1952 which apparently prayed for the appointment of a receiver of two corporations in which plaintiffs claimed some interest and which sought a decree quieting title to certain real property now known in part as Brookdale Cemetery. Those proceedings have continued to date and have involved a vast number of appeals to the Michigan Supreme Court, variously estimated at from twenty-two to thirty-eight, which figures do not include several additional appeals to the recently convened Michigan Court of Appeals, an intermediate appellate court.

The present action was brought to obtain relief from a judgment rendered by the Michigan Supreme Court, reported as *Harvey v. Lewis*, 357 Mich. 305 (1959) which affirmed the appointment of a receiver of two corporations, Brookdale Cemetery Association, a Michigan rural cemetery association and Brookdale, Inc., a Michigan corporation, determined that title to the real property in question was in the receiver of these two corporations and not in plaintiffs, and affirmed the findings of the trial court that the alleged conspiracy and fraud involving the formation of a syndicate, acquisition of the property in question and formation of the corporations involved and conduct of rural cemetery by the cemetery association had not been established by plaintiffs.

One of the grounds urged in the present motions is that the doctrine of res adjudicata must operate to bar this court's consideration of plaintiffs' contentions which were fully litigated in the State court proceedings. At the December 12 hearing, plaintiffs' counsel conceded on the rec-

ord that the State court had jurisdiction over the subject-matter of the receivership and had *in personam* jurisdiction over the parties therein, all of whom are parties to the present action with the possible exception of the Michigan Department of Commerce. However, plaintiffs contend that the State court judgment is not res adjudicata of the issues determined therein and does not bar this court's consideration of those same issues because the State court judgment is *void* as a matter of law in that it is in direct violation of *State* law and, as such, denies to plaintiffs the equal protection of law as guaranteed by the Fourteenth Amendment.[1]

Plaintiffs' counsel also conceded certain other matters on the record at the December 12 hearing. He stated that his clients had been represented by counsel of their choice during the entire State court proceedings and that they did fail to seek review of the allegedly void 1959 Michigan Supreme Court decision by application to the United States Supreme Court. This failure to seek such review was knowing and deliberate on the part of plaintiffs inasmuch as they were aware then of the same Constitutional issues which they are raising herein, and were advised by their present counsel to seek such ultimate review of the alleged violation of their constitutional rights which they are challenging herein.[2] Furthermore plaintiffs' counsel also

---

[1] See Appendix A, attached hereto, containing an excerpt of the transcript of the December 12 proceedings at which plaintiffs' counsel stated his position in this regard on the record.

[2] Plaintiffs' present counsel informed the court on the record at the December 12 hearing that he had carefully followed and studied the State court proceedings as they progressed because of his great interest in the issues raised therein. Although he stated he had no formal connection with the case at the time of the 1959 Michigan Supreme Court decision, he nevertheless was of the opinion that the decision was unconstitutional and he urged counsel representing plaintiffs at that time to appeal the decision to the United States Supreme Court. Plaintiffs' failure to heed such advice is unexplained on this record, but it is clear that their counsel had been so advised and could have sought such review if he had considered it in his client's best interests.

stated that each and every issue which plaintiffs are raising herein either was formally raised in the State court proceedings or could have been raised therein if plaintiffs' counsel had wished to do so.[3]

These facts and circumstances describe the classic situation for the application of the doctrine of *res judicata*. Perhaps the most compelling reason for the use of this doctrine is to bring an eventual end to litigation, so that in the orderly course of judicial administration, issues once litigated and controversies once resolved may not be subsequently reopened. It appears to the court that this is precisely what plaintiffs are attempting to do in this cause, to relitigate claims which have already been decided by the State courts of competent jurisdiction adversely to plaintiffs. Whether, as plaintiffs claim, the 1959 Michigan Supreme Court decision denied them equal protection of the law by incorrectly applying State law is not before the court at this time. If such decision violated plaintiffs' constitutional rights, their only relief would have been to seek direct review in the United States Supreme Court. This procedure they deliberately waived. They cannot now be heard anew on this same claim in federal district court. As the court pointed out in *Rhodes v. Meyer,* 334 F. 2d 709 (8th Cir. 1964), cert. denied 379 U.S. 915 (1964), the Civil Rights Act was not intended to allow persons knowledgeable in legal procedures to ignore an opportunity to correct an alleged error and then, in subsequent proceedings, attack the administration of justice.

And apart from the Civil Rights Act, the United States Supreme Court has unequivocally held that the federal district courts do not have original jurisdiction to enter-

[3] Plaintiffs' petition for rehearing formally entitled "motion to vacate," filed in the Michigan Supreme Court subsequent to its 1959 decision, raised the constitutional issues of denial of due process and equal protection.

tain actions brought by litigants defeated in the State courts against successful opponents to set aside the State court judgment as void because of alleged errors in deciding constitutional questions. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923).

> It affirmatively appears from the bill that the judgment was rendered in a cause wherein the (state) court had jurisdiction of both the subject matter and the parties; that a full hearing was had therein; that the judgment was responsive to the issues, and that it was affirmed by the Supreme Court of the State on an appeal by the plaintiffs . . . If the constitutional questions stated in the bill actually arose in the cause, it was the province and duty of the state courts to decide them; and their decision, whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication . . . Under the legislation of Congress, no court of the United States other than (the United States Supreme) Court could entertain a proceedings to reverse or modify the judgment for errors of that character . . . To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original. At 415-16.

The doctrine of the *Rooker* case assumes continued validity. See, e.g., *Lavasek v. White*, 339 F.2d 861 (10th Cir. 1965); *Chance v. County Board of School Trustees*, 332 F.2d 971 (7th Cir. 1964).

It is apparent from the above-quoted portion of the *Rooker* decision that its doctrine is fully applicable to the case at bar. In both cases, the action was brought in the federal district court by aggrieved State court litigants to seek relief from an allegedly *void* State court judgment. In both cases, the State court admittedly had jurisdiction over the parties and the subject-matter of the litigation. In both cases, plaintiffs claimed that the alleged errors in the State court's determination of constitutional questions rendered those judgments *void*. But it is clear from the language in *Rooker*, that such judgments rendered in the exercise of competent jurisdiction are at most erroneous; they are not void, are not subject to collateral attack, and are not open to relitigation in the federal district courts.

In view of the foregoing, it is not necessary to rule on the various other grounds urged in the motions under consideration herein. However, one word might be said with regard to the nature of plaintiffs' complaint which was objected to on the grounds that it failed to comply with Fed. R. Civ. Proc. 8(a). This rule requires a complaint to state "a short and plain statement of the claim showing that the pleader is entitled to relief." Plaintiffs' original complaint consists of ninety-four pages, attached to which are sixty-three exhibits and a subsequently filed amended complaint imposes an additional ten pages thereto. The court agrees that the dismissal of the complaint, as amended, would be proper, as was done in the similar case of *Corcoran v. Yorty*, 347 F.2d 222 (9th Cir. 1965), for the reason that the complaint is "so verbose, confused and redundant that its true substance, if any, is well disguised." At 223. However, in the interests of an expeditious determination of this action, and in view of plaintiffs' counsel's statements on the record, referred to above, as to the true nature of his claim the court has undertaken herein to decide the matter on the merits.

For the foregoing reasons, it is hereby ordered that defendants' motions to dismiss and for summary judgment are granted and that plaintiffs' cause of action be dismissed with prejudice.

Thaddeus M. Machrowicz,
U. S. District Judge.

Dated at Detroit, Michigan this
22nd day of December, 1966.

APPENDIX B-2

(Being Appendix "A" to Opinion of District Court)

Emma R. Moist, et al.
Plaintiffs,
v.
Bernard Belk, et al.,
Defendants.
File No. 29165

Excerpts of proceedings had in the Motion to Dismiss in the above-entitled matter taken before the Honorable Thaddeus M. Machrowicz, District Court Judge, at Detroit, Michigan on Monday, December 12, 1966.

Appearances: Mr. August F. Brandt, appearing on behalf of the Plaintiffs; Mr. Arthur M. Lang, appearing on behalf of Defendant Lewis; Mr. Albert Sugar, appearing on behalf of Defendant Belk; Mr. William Cooney, appearing on behalf of Defendant Beattie; Mr. John R. Starrs, appearing in pro per; Mr. C. A. Tsangadas, appearing in pro per; (2) Mr. Sydney List, appearing in pro per; Mr. Ralph McKenney, appearing in pro per; Mr. James M. Wienner, appearing on behalf of the Estate of Wienner;

Mr. William R. Rudell, appearing on behalf of the Attorney General.

The Court: I am primarily interested in knowing why this Court has jurisdiction over this matter. What new issues are there that brings this matter now within the jurisdiction of this Court?

Mr. Brandt: I am satisfied—

The Court: Why wasn't something done sooner?

Mr. Brandt: They have been active on this—this thing has been on the griddle continuously for the last fourteen years.

The Court: I mean since the Supreme Court action.

Mr. Brandt: There has been a contest going on right up to the last of—just here about a month ago. I think the last Court of Appeals denied the re-hearing just a little over a month ago.

But the reason we are here, and that is the original jurisdiction of this Court, and there is no question—

The Court: What is the (3) original jurisdiction of this Court, tell me?

Mr. Brandt: Well, the original jurisdiction of this Court is going to come in this way: We don't deny that the State Court had jurisdiction of the subject matter. We don't deny that the State Court had jurisdiction of the parties. But we do say that the original jurisdiction of this Court is being invoked because the State Court had no power to enter an order or judgment or a dictative which under the law of the State of Michigan they could not make.

United States District Court,
Eastern District of Michigan—ss.

I, Walter R. Lauckner, one of the Official Court Reporters for the above court, do hereby certify that I recorded stenographically the testimony taken and proceedings had in the above-entitled and numbered cause before the Honorable Thaddeus M. Machrowicz, District Court Judge, at Detroit, Michigan, on December 12, 1966; and that the foregoing and annexed three typewritten pages constitute a complete and accurate transcript of that portion of the proceedings herein transcribed.

/s/ Walter R. Lauckner,
Official Court Reporter,
739 Federal Building,
Detroit, Michigan.

Dated: December 22, 1966.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 16 1967
JOHN F. DAVIS, CLERK

No. 609

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

EMMA R. MOIST, etc., et al.,
Petitioners,

v.

BERNARD BELK, etc., et al.,
Respondents.

REPLY BRIEF OF PETITIONERS

AUGUST F. BRANDT,
Attorney for Petitioners,
363 St. Clair Avenue,
Grosse Pointe, Michigan 48230.

Interstate Brief & Record Co., 356 E. Congress St., Detroit, Michigan 48226
WO. 2-8745—WO. 2-8732

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 609

EMMA R. MOIST, individually and as assignee of Sidney M. Harvey and William T. McAlonan; LOUISE C. KUSHIGIAN, Administratrix of the Estate of Thermie K. Henkle, deceased; GEORGIANA S. WHITMAN, survivor of herself and Henry R. Whitman, deceased, and EVELYN M. SANDERS, Special Administratrix of the Estate of Muriel Miller, deceased,

Petitioners,

versus

BERNARD BELK, individually and as alleged "Receiver" of Brookdale Cemetery Association and Brookdale, Inc., alleged Michigan corporations, GEORGE LEWIS, individually and as survivor of himself and Daniel Lewis and Saul Lewis, both deceased, formerly co-partners doing business as Lewis Brothers and as Lewis Bros., Inc., Lewis Brothers Memorial Chapel, Daniel Lewis & Brothers, Lewis Bros. Funeral Directors, Inc., and Mt. Sinai Memorial Cemetery Association, CHARLOTTE L. KLINE, Administratrix of the Estate of Saul Lewis, deceased, NAOMI V. HILSEN and RICHARD E. MANNING, successor administrators, duly appointed of the Estate of Daniel Lewis, deceased, BROOKDALE CEMETERY ASSOCIATION, an alleged Michigan Rural Cemetery Association, BROOKDALE, INCORPORATED, an alleged Michigan Profit corporation, CONSTANTINE A. TSANGADAS, JOHN R. STARRS, STANLEY E. BEATTIE, RALPH W. McKENNEY, SYDNEY LIST, DAPHNE LIST, JAMES M. WIENNER, Administrator of the Estate of Harris W. Wienner, deceased, and DEPARTMENT OF COMMERCE, formerly Corporation and Securities Commission, of the State of Michigan,

Respondents.

REPLY BRIEF OF PETITIONERS

As to Respondents' Replies Petitioners say:

1. Respondents Starrs, Beattie, McKenney, Tsangadas, Belk and Lewises do not deny that, acting in concert, they *purposefully* engaged in a *continuing* (¶3 p. 7 Petition) forbidden conspiracy set forth in Section 1985, 42 United States Code to bring about the appointment of one of their number as receiver of Brookdale Cemetery Association, a non-profit, rural cemetery corporation, by filing fraudulent claims against such corporation, and thereafter proceeding to use, contrary to Section 1983, 42 United States Code, the power possessed by defendant Starrs, as an officer of the State, to wrongfully change the title and ownership of certain land, and procure the allowance of said claims.

2. Respondents do not deny that Defendant Starrs, as receiver of Brookdale Cemetery Association, acting in concert with the other defendants, and wrongfully using the power possessed by him as an officer of the State:

> (a) Established an entirely new cemetery business for defunct Brookdale Cemetery Association upon its mortgaged land and thereafter wrongfully burdened such land with upwards of 6,000 graves (R. 87a), contrary to Michigan law, which expressly forbids continuing the business for which a corporation was organized more than 3 years after its Charter shall have become void (CL 1938, Sec. 450.-75 (Stat Ann Sec. 21.75)), and which expressly forbids the sale of burial rights upon mortgaged land (CL 1948, Sec. 456.109 (Stat Ann Sec. 21.879)).

(b) Dissipated upwards of $417,000.00 realized from said unlawful burials, substantially in fees, expenses and commissions paid himself and other defendants without making any provision whatever to establish a perpetual care fund expressly required by Michigan law (CL 1948, Secs. 456.107, 456.107A (Stat Ann Secs. 21.877, 21.877(1)).

(c) Made a sale of said dedicated cemetery land to pay a judgment creditor (R. Plt. Exh. 62, 197a-198a), contrary to Michigan law (CL 1948, Sec. 600.6023 (Stat Ann Sec. 27A. 6023)).

3. Respondents' "Briefs", "Objections" and "Answers", full of generalizations and wholly lacking in reference, detail, or support, disclose no relationship between Respondents' Replies and the Petition for Writ of Certiorari under consideration. The real issue here cannot be side-tracked by an unwarranted plea of *res adjudicata*. The Supreme Court of Michigan in *Harvey v. Lewis*, 357 Mich. 305 at p. 314, on the case as presented to it, modified the decree of sale, and specifically adjudged the title and ownership of the land in question to be in Brookdale Cemetery Association, incorporated as a Michigan non-profit, rural cemetery corporation pursuant to the express provisions of Brookdale Syndicate Number One, composed solely of plaintiffs (R. 12a-14a; 16a-18a, Plt. Exh. 5, 108a-109a). The present case is upon a different and subsequent cause of action, and only 5 of the present 14 defendants were defendants in the prior State court proceedings (R. 1a, Plt. Exh. 32, 153a).

It is the question litigated and determined in the original action, not what might have been thus litigated. Only upon such matters is the judgment conclusive in another action. *United States Fidelity & Guaranty Co. v. McCarthy*, 33 F2d 7, 9.

The facts as clearly stated *which Respondents do not deny,* clearly entitle plaintiffs be given an opportunity to prove their allegations and to obtain relief.

Nor can the real issues here be side-tracked by Respondents' allusion to the numerous unsuccessful attempts by former counsel to appeal successive interlocutory orders, all of which appeals were summarily dismissed without *any hearing whatever,* because former counsel failed to first obtain leave to appeal. See: *Harvey v. Lewis,* 365 Mich. 159, 160-161.

4. Respondents contend the actions taken by Defendant Starrs as receiver, all contrary to Michigan law, were taken pursuant to the order of the State court. Fundamental Constitution and Statutory Rights are protected against all forms of State action, *even judicial.* See: *Brouwer v. Kent County Clerk* (1965), 377 Mich. 616, 643, 644. In *Fish v. Fish* (1966), 4 Mich. App. 104, 108, the Court said:

> "It is not for the judge presiding over the court to determine whether or not he will apply the law. He has no choice. He did not make the law, and he cannot change it. That law is as obligatory on him as it is on the humblest suitor who ever appeared in his court. He is bound to apply it in determining controversies."

The Respondents have made no answer to the cases which Petitioners have pointed out showing the conflict on the law between the various Courts of Appeal in regard to the questions raised in this case. Furthermore, they fail to show that the Court of Appeals did not misapply the law as laid down by this Court. Petitioners ask this Court to resolve these questions.

CONCLUSION

Wherefore, the Petitioners again respectfully petition this Honorable Court to issue a writ of certiorari directed to the Court of Appeals for the Sixth Circuit commanding said Court to send to this Court a full and complete transcript of the record in said Court, to the end that this cause may be reviewed by this Court, and that the erroneous judgment of the Court of Appeals for the Sixth Circuit be reversed and such other relief be granted as to this Court may seem proper.

Dated this 11th day of October, A. D., 1967.

Respectfully submitted,

AUGUST F. BRANDT,
Attorney for Petitioners,
363 St. Clair Avenue,
Grosse Pointe, Michigan 48230.